Cynulliad Cenedlaethol Cymru
The National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
The Constitutional and Legislative Affairs Committee

Dydd Llun, 9 Mawrth 2015
Monday, 9 March 2015

Cynnwys
Contents

Cofnodir y trafodion yn yr iaith y llefarwyd hwy ynddi yn y pwyllgor. Yn ogystal, cynhwysir trawsgrifiad o'r cyfieithu ar y pryd.

The proceedings are reported in the language in which they were spoken in the committee. In addition, a transcription of the simultaneous interpretation is included.

Aelodau'r pwyllgor yn bresennol
Committee members in attendance

Alun Davies	Llafur Labour
Suzy Davies	Ceidwadwyr Cymreig Welsh Conservatives
David Melding	Y Dirprwy Lywydd a Chadeirydd y Pwyllgor The Deputy Presiding Officer and Committee Chair
William Powell	Democratiaid Rhyddfrydol Cymru Welsh Liberal Democrats
Simon Thomas	Plaid Cymru The Party of Wales

Eraill yn bresennol
Others in attendance

Huw Davies	Uwch Gwnsler Deddfwriaethol, Swyddfa'r Cwnsleriaid Deddfwriaethol, Llywodraeth Cymru Senior Legislative Counsel, Office of the Legislative Counsel, Welsh Government
Dr Ruth Fox	Cyfarwyddwr a Phennaeth Ymchwil, Cymdeithas Hansard Director and Head of Research, Hansard Society
Dylan Hughes	Y Prif Gwnsler Deddfwriaethol, Swyddfa'r Cwnsleriaid Deddfwriaethol, Llywodraeth Cymru First Legislative Counsel, Office of the Legislative Counsel, Welsh Government
Terry Kowal	Uwch Gwnsler Deddfwriaethol, Swyddfa'r Cwnsleriaid Deddfwriaethol, Llywodraeth Cymru Senior Legislative Counsel, Office of the Legislative Counsel, Welsh Government

Swyddogion Cynulliad Cenedlaethol Cymru yn bresennol
National Assembly for Wales officials in attendance

Stephen Boyce	Y Gwasanaeth Ymchwil Research Service
Steve Davies	Cynghorydd Cyfreithiol Legal Adviser
Daniel Greenberg	Cynghorydd Arbenigol Special Adviser
Gwyn Griffiths	Uwch-gynghorydd Cyfreithiol Senior Legal Adviser
Ruth Hatton	Dirprwy Glerc Deputy Clerk
Dr Alys Thomas	Y Gwasanaeth Ymchwil Research Service

Gareth Williams	Clerc Clerk

Dechreuodd y cyfarfod am 13:32.
The meeting began at 13:32.

Cyflwyniad, Ymddiheuriadau, Dirprwyon a Datgan Buddiannau
Introduction, Apologies, Substitutions and Declarations of Interest

[1] **David Melding:** Good afternoon, everyone, and welcome to this meeting of the Constitutional and Legislative Affairs Committee. I'll just make the usual housekeeping announcements. We do not expect a routine fire drill, so if we hear the alarm, please follow the instructions of the ushers, who will help us leave the building safely. Any mobile device needs to be switched to 'silent' or off. These proceedings will be conducted in Welsh and English. When Welsh is spoken, there's a translation on channel 1. Should you need any amplification of our proceedings, then you'll get that on channel 0.

Tystiolaeth mewn Perthynas â'r Ymchwiliad i Ddeddfu yn y Pedwerydd Cynulliad
Evidence in Relation to the Inquiry into Making Laws in the Fourth Assembly

[2] **David Melding:** Item 2 is evidence in relation to our inquiry into law making in the fourth Assembly. I'm very pleased to welcome Dylan Hughes, the First Legislative Counsel and his colleagues. Do you want to introduce them, Dylan?

[3] **Mr Hughes:** Iawn. Diolch yn fawr iawn, Mr Cadeirydd. Diolch i chi am y gwahoddiad i gymryd rhan yn yr ymchwiliad. Wrth feddwl yn ôl, y swydd gyntaf i mi gael ar ôl ymuno â'r gwasanaeth sifil yn 1999 oedd fel un o'r cynghorwyr cyfreithiol i'r pwyllgor hwn, fel yr oedd bryd hynny. Felly, rwy'n falch iawn i fod yn ôl, fel petai. Hoffwn feddwl hefyd bod gwneud y swydd yna wedi fy helpu i weld pethau o'ch persbectif chi. Rwy'n falch iawn hefyd fod yr ymchwiliad yn cael ei gynnal. Mae'n amlwg i mi fod amcanion yr ymchwiliad yn debyg iawn i'n hamcanion ni fel swyddfa, sef sicrhau bod cyfraith Cymru gystal ag y gall fod.

Mr Hughes: Yes. Thank you very much, Chair. Thank you for the opportunity to participate in this inquiry. Thinking back, my first post having joined the civil service in 1999 was as a legal adviser to this committee, as it was at that time. So, I'm exceptionally pleased to be back, as it were. I would like to think, too, that doing that particular job has helped me to see things from your perspective. I'm also very pleased that this inquiry is being held. It's clear to me that the objectives of the inquiry are very similar to our objectives as an office, namely to ensure that Welsh law is as good and effective as it can be.

[4] Rwyf wedi gofyn i Huw Davies a Terry Kowal ymuno â mi. Mae'r ddau ohonyn nhw'n uwch-gwnsleriaid deddfwriaethol yn y swyddfa. Rwyf wedi gofyn i Huw ddod achos taw Huw oedd aelod gwreiddiol y swyddfa—mae e wedi bod yn gwnsler deddfwriaethol ers 2007. Rwyf wedi gofyn i Terry ddod achos mae Terry yn un o'n pobl newydd ni—fe wnaeth Terry ymuno â ni jest dros flwyddyn yn ôl o'r swyddfa gyfatebol yn yr Alban. Mae e'n un o'r bobl rydym wedi bod yn ffodus i'w denu i'r I've asked Huw Davies and Terry Kowal to join me. Both are senior legislative counsel within the office. I've asked Huw to come because Huw was the original member of the office—he has been a legislative counsel since 2007. I've asked Terry to attend because Terry is one of our new recruits—he joined us only a little over a year ago from the corresponding office in Scotland. He's one of the people we've been fortunate to attract to the office who have the appropriate experience.

swyddfa sydd gyda'r profiad priodol.

[5] **David Melding:** Thank you very much. We appreciate your presence. Obviously, any member of your team can answer the questions, or a particular question, but perhaps I'll ask you, Dylan, to orchestrate how you do that. But, we're obviously after the actual evidence and we're pleased that you've such a strong team with you this afternoon.

[6] You did refer to the fact that you're an old hand at all this, since the very start, and I just wonder what observations you make about the capacity within the team now in terms of how that's developed and how it's coping with the very formidable challenge, really, of, for the first time in Wales's history, of using the primary law-making power properly within Wales.

[7] **Mr Hughes:** Yes. Thank you, Chair. You used the word 'formidable', and I'd agree with that. I think it's something we need to remember at all times, that this is something that's very difficult. I think that's an important context for us to bear in mind at all times. In terms of capacity, there are 14 of us in the office now—14 counsel, although not all of the counsel work full time. We also have access to four very experienced counsel on a consultancy basis. In 2011, there were six of us, and it became clear fairly early on that that was not going to be enough, that we were going to struggle to fulfil the Government's legislative programme. So, we started at that point to think about how we would expand the office. One thing we didn't want to do was expand too quickly, and we were conscious also of the need to make sure that we brought in people with sufficient experience. So, we started by bringing two people in on secondment, one through the Office of the Parliamentary Counsel in London and one from the Parliamentary Counsel Office in Edinburgh. We also engaged the services of Philip Davies, who is a very experienced counsel, and he was the drafter of both the Government of Wales Acts. So, there was probably nobody better we could turn to.

[8] That formed the basis for expansion and the office was restructured. The grading structure was changed and that enabled us to go out to recruit experienced counsel, and I was very pleased that we were able to do that. We eventually managed to get three experienced drafting counsel, one of whom is Terry, and two others from the Office of the Parliamentary Counsel in London. That made a huge difference to us, and it also gave us a platform then to recruit more recently some less experienced counsel and it gave us the means for induction et cetera.

[9] **David Melding:** We completely understand the sophistication of the task you have to complete, and therefore you will recruit talent from around the United Kingdom. It's highly specialised work. Mr Kowal here from Scotland—we're always pleased to welcome our Celtic cousins—. But what approach do you take to ensuring that people have the appropriate cultural awareness of where Wales sits in the United Kingdom and the particular challenges? Not all of that relates to the Welsh language, but a fair amount of it does. So, how do you deal with that, because your team, for the foreseeable future, is likely to draw people from other parts of the United Kingdom, I'd imagine?

[10] **Mr Hughes:** Yes, that's right. To some extent, it's straightforward from a drafting perspective, because the jobs are very similar. The whole purpose of recruiting people with experience was that they were far more able to hit the ground running. But, obviously, there are differences, and we need to make sure that they're aware of those. I'll ask Terry to comment on his personal experience in a minute, but one of things that I've been conscious of throughout, since starting in the post, is that I felt that we needed to do more to retain the corporate memory. I hate that expression, but it was quite clear to me when I started in post in 2011 that a lot of the Government's knowledge about how to develop Measures was found in the office. Part of the problem was that a lot of that was in people's heads. A lot of it was in Huw's head, for example. It was also in the heads of two people who actually left the Welsh

Government, so it was quite clear that we needed to do something to retain the knowledge that we'd developed over time.

[11] So, we've created a SharePoint site, which works as a means for sharing know-how. We have a particular know-how part of the site, which is called Blegywryd, and partial credit to Mr Thomas for the name he gave to his opposition party debate. We have that as a means of retaining our corporate knowledge. We also have a forum within that site so that, when we discuss drafting issues, they're not lost in the thousands of e-mails that we all have. So, that was building on top of the legislative drafting guidelines that we'd developed towards the end of the last Assembly. There are various other things that we do in general terms to induct, like the fact that we have an in-house training programme now and we have a legislation education programme, which you may want me to talk more about later on.

[12] But turning specifically to the issue of inducting experienced drafters from elsewhere, I think, as you say, the Welsh language is an important aspect of it. I think the practical point that new drafters have to learn about is the impact that the process of producing a second text has on the time that they have to produce the first. There's always a temptation, as a drafter, to push on to try to continuously improve the text, but it comes to a point where you're actually impacting on the work of several other people and you have to stop in order to make sure that you're producing the second language text properly, and that you're ensuring that the Bill is properly formatted et cetera. So, I think that's one difference that they have to get used to. They also have to get used to the fact that they don't have control of all of the text, because, of course, they don't have Welsh language skills.

[13] There are probably two other differences. One is depending on where they've come from. So, if they've come from Scotland, they have to get used to the peculiarities of working within the single Welsh and English jurisdiction and the way that our legislation is often closely intertwined with UK legislation and how, in particular, it applies to England. I think as well we probably have quite a different role in relation to advising on legislative competence. So, for example, we are expected to contribute to the process of assisting the Counsel General in that respect. That's probably something that most other drafting offices don't do. Terry is probably in a better position to comment, because, of course, he's been through it with us.

[14] **Mr Kowal:** Yes. Thanks, Dylan. First, I'd like to say that I'm delighted to be here. It's really been a fascinating year and a bit now; I've really enjoyed my time in the office here in Cardiff so far. It's just been a fascinating time to have joined, to be honest, at this still quite early stage of developing primary legislation in Wales.

[15] As Dylan said, the core of the job is still essentially the same, and that was the thinking behind trying to bring in some experienced counsel into the office. But there were four factors that I felt I personally had to get to grips with quite quickly, one of which is the language considerations. I'm going to try to make efforts—I certainly won't be doing it here today—to learn some Welsh at a sort of conversational level, but I don't think I can ever aspire to have the degree of linguistic skill that our legislative translation team has and that those who have got Welsh language skills in the office have. The added time that it builds into the process is definitely a factor, but I think that I would say, without exception so far, in the things that I've been involved in, having those extra eyes, having those extra sets of expertise, working on a draft has contributed to improving the draft in both languages. Often, you find that something that might be slightly ambiguous in the English has to be resolved in Welsh and vice versa, and that certainly helps the process.

[16] You would think, coming from Scotland, and the fact that I have experience in another devolved legislature—. But it's the differences that are crucial in the devolution settlements between the two. The conferred-powers model means you have to think slightly

differently about how you tackle a particular subject. That often doesn't necessarily impact on the drafting, but it can do. There are other nuances, like being careful not to tread on Minister of the Crown functions, which is another aspect that's treated differently here than in Scotland. The single jurisdiction point, as Dylan pointed out, is something that you just don't—. Scotland is its own jurisdiction. The difference between application and extent doesn't necessarily make any particular difference to the drafting of legislation in Scotland, whereas it is very much different here. It can be quite tricky from a drafting perspective to make sure that you're, sort of, carving things out particularly to apply in Wales, despite the fact that, as a matter of law, it extends to the whole jurisdiction of England and Wales.

[17] The fourth thing is the Assembly procedures, which you'd superficially think—or I certainly did, perhaps slightly ill-informed—were essentially the same between the Assembly and the Scottish Parliament. But they're not. The procedures are slightly different. Report Stage is an extra consideration here that, I expect, is a potential improvement over the Scottish system; although, in Scotland, there are slightly more developed rules, I should say, on admissibility of amendments, relevance and scope. There's quite extensive published guidance from the Presiding Officer on that, which, to date, doesn't exist here in the Assembly. So, that's probably more of an evolving topic here, I would think, than in Scotland. But, overall, it's been a fascinating time and we're looking forward to more of it as we go on.

13:45

[18] **David Melding:** For people who are recruited outside Wales, who are not Welsh, do you think there is potentially a danger that people come in and think 'Well, we translate into Welsh rather than legislate and draft in Welsh', because it's quite a big difference, isn't it? I just wonder how we relate to the wider legislative community out there, and whether the people involved in drafting based in other parts of the United Kingdom think that's what goes on here: that it's a matter of translation. It may be high-level or high-skilled translation, but that's what it is.

[19] **Mr Kowal:** I had an open mind about that. I think mostly because, as we all are, we're all members of the Commonwealth Association of Legislative Counsel, and so we look quite often at other examples from across the Commonwealth. The most striking example of bilingual legislation is Canada, which, for the most part—and the others will correct me if I'm wrong—purport to co-draft in both French and English simultaneously. So, I honestly approached it with an open mind as to what the best approach was here. I think we have tried out the co-drafting at times, but we also rely on the skilled translators. As I say, our translators are very skilled, particularly at understanding the legislative context within which they're working, and I'd reiterate that they have improved the English text in every instance where I've worked with them so far.

[20] **Mr Hughes:** Would it be helpful, Chair, if I explained what we do in relation to the production of the second text? I'm not too sure to what extent it's fully understood.

[21] **David Melding:** Were you going to probe along these lines, Simon?

[22] **Simon Thomas:** No.

[23] **David Melding:** Then, please do, Dylan.

[24] **Mr Hughes:** Terry mentioned Canada, and I think that's where this story probably starts, going back to 1999, 2000 and a number of visits. There were two visits to various Canadian jurisdictions to look at what they did. The then Counsel General and, in fact, the current Lord Chief Justice were among the people who went on those visits to Canada to look

at the various models. As Terry mentioned, the federal Government adopts what's called the co-drafting model, through which you have a francophone and an English speaker working together and producing the text at the same time. But that's not the only model that's adopted. I think, at the time, we considered about five different models, which were variations on a theme, granted, but they ranged from what we called the translation model to a co-drafting model. In our case, we've tried a few of those models. It started with the subordinate legislation, so going back 15 years ago, we did try and experiment with co-drafting of subordinate legislation, but it proved to be a little bit impractical because the enabling legislation was, of course, in English only and the instructions we received were in English only, because of the practicalities of working within the Government, so it was a little bit artificial to do it in that way—primarily because of the enabling powers being in English only and the statutory framework being in English only.

[25] I think that's gradually changing, but we still primarily rely on a specialist team of jurilinguists or legislative translators, whatever you want to call them. So, what generally happens is that it's produced in one language first, and normally that is in English, but during that process, there will be discussions about terminology and there'll be discussions about various phrases that we want to ensure are, of course, the same in Welsh and English. So, as I say, the text is generally produced in the one language first and is then translated, but then, it returns to us as the drafters, and it's at that point that we put a lot of work into ensuring that both texts are equivalent.

[26] As Terry mentioned earlier, as part of that process, you've in effect got somebody else editing the text, and in consequence, if they don't understand what we've drafted in the first place, then we know that there's a problem, and also, the second language will highlight ambiguities, quite often. So, you'll often find that you look at what's been produced in the second language and you think it's not particularly clear, and you think, 'Well, actually, if I'd have done this differently—.' This, of course, is something that's easier for those of us who are bilingual, but you look at it and you think, 'Right, I would actually rephrase this' in the Welsh or in the English, and then you actually look at the other language and you think, 'Actually, I should rephrase it there as well'—i.e., it hadn't been drafted that well in the first place. So, it's actually a process that exposes that.

[27] The other thing to note is that we don't always do it like that, so we have co-drafted some Bills. We've also drafted some Bills where the Welsh and English were not drafted simultaneously, so I think there's one example where we produced the text in Welsh first, and we then went on to produce the text in English afterwards. So, we did everything within our office as opposed to using the translation model. But, ultimately, we are responsible for the text in both languages, so we have to do a lot towards the end of the process to ensure that the texts are equivalent, and are drafted as well as possible in both languages.

[28] **David Melding:** I find this very interesting and candid, actually, and helpful. So, in an ideal situation, we might want to work towards a co-drafting model, or whatever the Canadians use, if they are able to deliver at that level, but at the moment, it is still largely driven by the English draft, but there's obviously a lot of—not always—interaction then, once you have that draft, and there are changes because things work well in the Welsh, but you may need to change the English version a bit. So, there's a sort of constant activity, then, between the two drafts until eventually, obviously, you produce something you want to then introduce to the Assembly.

[29] Would you like to see more genuine co-drafting, or is that really just pursuing a counsel of perfection that's perhaps not a very productive way of working? I think it's useful for our committee to know what would be a sort of gold standard, though I don't want to get drawn into a casual counsel of perfection here. I think we want to know what the practicalities are.

[30] **Mr Hughes:** I think you're almost getting to the answer there. I think it just depends. It depends on the situation. I think, in some cases, depending on the nature of the Bill, we should be co-drafting. Off the top of my head, I'd be thinking more about Bills that have a high impact on the public, a high impact on individuals. But there are situations where I'd have to say it might not be practical: if you have very, very large Bills. Our experience has shown us that if you do co-draft, or if we produce both texts within our office, then it is very time consuming. It is considerably more efficient to use the legislative translators, who are expert at what they do, and are able to produce the second text far quicker than we can. So, I think much of it depends.

[31] The other thing to bear in mind is that, when there are certain phrases that we reconsider after the text has been produced by the legislative translation unit, there is considerable debate at that point, so a number of the key phrases or the key provisions in any piece of legislation will, in effect, have been co-drafted in any event because there has been discussion about them, so I think it probably just depends on the situation. I don't think it's necessary to adopt a co-drafting model in all cases, by any means, and I think we need to tailor our approach accordingly.

[32] One thing, while we're still talking about the Welsh language, is that I think there's probably a lot being done to consider legislation from a user's perspective in the English language, so there's quite a bit of user testing being done on the approach to language that we adopt. I think you heard from the Queen's Printer, who, in conjunction with the Office of the Parliamentary Counsel, had an exercise considering how members of the public, some of whom were legally qualified and some of whom weren't, looked at different approaches to drafting legislation and the use of different forms of language. I don't think we've really done much in the Welsh language, and I think it would be interesting to see what members of the public think of the approach that we take. One of the things that was interesting, as part of that process when the Queen's Printer came to give evidence to the committee, was that there were some very interesting statistics produced as to the proportion of visits that there've been to the Welsh language text of legislation.

[33] **David Melding:** We noted that and were very encouraged by it.

[34] **Mr Hughes:** Yes, exactly.

[35] **David Melding:** Some of us were a bit surprised, perhaps, if we were candid.

[36] **Mr Hughes:** Well, I have to say, I was surprised, and I was very pleased, and I think, at that point, I thought to myself, you know, we need to make sure that we do more to ensure that this high proportion of people who're obviously reading our legislation through the medium of Welsh understand it, because, you know, we all know—I don't want to go off on a tangent here—but there are, perhaps, people who are sometimes reluctant to look at formal documents in Welsh, despite the fact that they're fully bilingual. You would've thought that legislation would be quite high up there as to the kind of document that people might be reluctant to look at in Welsh, but it would appear, from the statistics that we have so far, that they're not.

[37] **Simon Thomas:** They're maybe trying to understand the English.

[38] **Mr Hughes:** Perhaps, yes. [*Laughter.*]

[39] **David Melding:** Okay.

[40] **Mr Hughes:** I'd like to think that the process that I've described means that we don't

get into that position, but it is an obvious source of trying to deal with ambiguities. I've done quite a lot of work in European law and that, again, is something that you will quite often do: you'll look at the French-language text, in my case, to see if it helps you understand the English text. It generally doesn't, but—[*Laughter.*]

[41] **David Melding:** It's worth a try.

[42] **Mr Hughes:** In all seriousness, it is something that can help.

[43] **David Melding:** Did you want to ask a supplementary?

[44] **Simon Thomas:** Yes.

[45] Yn anffodus, rwy'n mynd yn ôl ryw 10 munud, ond mae un peth yr oeddwn i jest eisiau ei ofyn. Pan oeddech chi'n disgrifio'r ffordd roedd y swyddfa wedi cynyddu adeg dechrau'r Llywodraeth bresennol a'r Cynulliad presennol, roedd hynny'n cyd-daro â'r dystiolaeth rydym ni wedi'i chael gan sawl corff, yn enwedig yn y trydydd sector, a oedd yn dweud pa mor araf oedd y flwyddyn gyntaf o ran deddfu. Roedden nhw'n teimlo nad oedd yna ddim byd y gallent ei wneud i ddylanwadu ar y broses, ac yn sydyn, fe ddaeth y deddfu yn fwy trwm, ac, wrth gwrs, yn fwy diweddar, yn drymach byth. Roedden nhw'n teimlo eu bod nhw wedi colli gafael, i raddau, ar y gallu i ddylanwadu ar hynny. Wel, mae hynny'n fater o gapasiti y tu fewn i'r sector yna, o bosib, ond roeddwn i jest yn gofyn, a oeddech chi'n ymwybodol, wrth i chi gynllunio'r ffordd yr oedd y swyddfa'n cael ei hehangu—wel, yn amlwg, roeddech chi'n ymwybodol bod rhaglen ddeddfwriaethol—o'r fath o batrwm a fyddai'n deillio o'r ffaith eich bod chi wedi dewis ehangu swyddfa yn y ffordd yr oeddech chi wedi'i wneud?

Unfortunately, I'm taking us back about 10 minutes or so, but there is one thing I wanted to ask. When you were describing the way the office had expanded at the start of the current Government and the current Assembly, that chimed with evidence that we've received from several bodies, particularly in the third sector, who told us how slow the first year was in terms of legislating. They felt that there was nothing they could do to influence the process and suddenly, the legislative burden became heavier, and, of course, recently, it's got heavier still. They felt that they had lost control, to an extent, over the ability to have an influence on that. Well, perhaps that's an issue to do with the capacity within that sector, but I just wanted to ask, were you aware, as you planned the way in which the office was expanded—well, obviously, you would've been aware of the legislative programme—of the kind of pattern that would emerge as a result of choosing to expand the office in the way that you did?

[46] **Mr Hughes:** Oeddem. Fel y dywedais i yn gynharach, roedd e'n amlwg i ni nôl yn 2011 fod beth oedd i ddod yn mynd i olygu nad oedd digon o bobl gennym. Mae ein bywyd ni'n cael ei drefnu'n eithaf manwl: mae gyda ni'r *spreadsheets* mawr yma sy'n cynllunio, o wythnos i wythnos, beth rŷm ni'n gorfod ei wneud. Roedd gyda ni'r rheini yn mynd nôl at 2011, ac fel y dywedais i, roedd e'n amlwg y byddem ni'n gorfod ehangu. Ond, i raddau, rŷm ni wedi ehangu gyda'r rhaglen. Roedd e'n un o'r rhesymau yr oeddem ni'n teimlo nad oedd rhaid inni ehangu'n rhy gyflym, achos roeddem ni'n gallu gweld beth fyddai'r patrwm.

Mr Hughes: Yes. As I said earlier, it was clear to us back in 2011 that what was facing us would mean that we didn't have sufficient capacity within the office. Our life is quite carefully organised; we have large spreadsheets that plan, on a week-to-week basis, what we have to do. We had those going back to 2011, and as I said, it was clear that we would need to expand. But, to an extent, we have expanded alongside the programme. It was one of the reasons that we didn't have to actually expand the office too swiftly, because we could identify the pattern.

[47] **Simon Thomas:** Mewn ffordd, dyna beth rwy'n gofyn: beth oedd y gyriant? Ai cyflenwi staff a chapasiti oedd y gyriant, neu'r Llywodraeth, yn y ffordd yr oedd y Llywodraeth yn delio â'r rhaglen, beth bynnag, neu a oedd yna gyfuniad o'r ddau beth?

Simon Thomas: In a sense, that's what I'm asking you: what was the driver? Was it supplying staff and capacity that was the driver, or was it the Government in the way in which it dealt with the programme, whatever, or was it a combination of both those things?

[48] **Mr Hughes:** I raddau, roedd yna gyfuniad, ond byddwn i'n dweud, siŵr o fod, taw'r peth mwyaf oedd bod yna dipyn o waith, wrth gwrs, cyn y pwynt pan fyddai cyfarwyddiadau yn dod i ni fel swyddfa. Felly, buaswn i'n dweud, yn gyffredinol, dyna'r rheswm. Yr oedd yn rhaid ymgynghori ar wahanol bolisïau ac roedd yn rhaid gwneud y gwaith paratoi o ran gweithio ar y polisi manwl i sicrhau ein bod ni mewn sefyllfa i allu drafftio pob Bil, felly dyna beth oedd y peth mwyaf. Ond, ar ôl dweud hynny, jest yn gyffredinol, gallai pethau fod wedi bod yn wahanol, ac roedd yn amlwg bod chwech o bobl ddim yn ddigon, ac roedd yna botensial ein bod ni'n mynd i ddal popeth i fyny. Yn amlwg, fel gwasanaeth sifil, nid oeddem ni eisiau i Weinidogion deimlo bod y rhaglen yn cael ei gyrru gan nifer y bobl a oedd gyda ni yn ein swyddfa ni. Fodd bynnag, ar ôl dweud hynny, yn gyffredinol, mewn lot o lefydd, dyna fel mae e'n gweithio. Ni, mwy na thebyg, yw'r rhan leiaf o'r gwasanaeth sifil, felly mae'n amlwg bod yn rhaid cael rhyw olwg manwl ar faint o gapasiti sydd gyda ni fel swyddfa. Ond, fel y dywedais i, rydym ni wedi ehangu gyda'r rhaglen.

Mr Hughes: To an extent, it was a combination of both, but I would say that the predominant factor was probably that there's a lot of work to be done before you get to the stage when instructions are given to us as an office. So, I would say that, generally speaking, that was the reason. We had to consult on various policies and the preparatory work had to be done in terms of working on the policy details, to ensure that we were in a position to be able to draft every Bill. So, that was the biggest thing. But, having said that, just generally, things could have been very different, and it was clear that six people weren't going to be sufficient, and there was a risk that we would hold everything up. Clearly, as a civil service, we didn't want Ministers to feel that the programme was driven by the number of people we had available in our office. However, having said that, generally speaking, in many places, that's how things do work. We, I suppose, are the smallest part of the civil service, so clearly we have to keep a very close eye on the capacity available to us as an office. But, as I said, we have expanded as the programme has expanded.

14:00

[49] Gwnaethon ni greu rhai ystadegau yn ddiweddar. Rydym wedi cynyddu'r nifer o eiriau rydym wedi eu drafftio ddwywaith—felly mae dwywaith y drafftio wedi ei wneud yn y Cynulliad yma nag yn y trydydd Cynulliad. Rydym wastad wedi cael perthynas eithaf agos gyda swyddfa'r cwnsleriaid deddfwriaethol yn Llundain, ac roeddent yn ein helpu ni eithaf lot yn y trydydd Cynulliad. Nhw oedd yn drafftio rhai o'r Mesurau; gwnaethon nhw roi help mawr i ni yn ystod y cyfnod hynny. Roedd hynny'n ffactor arall; yn mynd yn ôl i 2011, roedd yn amlwg nad oedd y swyddfa yn Llundain yn mynd i allu ein helpu ni yn yr un modd.

We produced some statistics recently. We've increased the number of words drafted twofold—so, twice as much drafting has been done in this Assembly as compared to the third Assembly. We have always had quite a close relationship with the parliamentary counsel's office in London, and they helped us a great deal in the third Assembly. They drafted some of the Measures; they gave us some great assistance at that point. That was another factor; going back to 2011, it was clear that the office in London wasn't going to be able to assist us in that same way. So that was something else that we had to consider.

Roedd hynny'n rhywbeth arall roedd yn rhaid
i ni ei ystyried.

[50] **David Melding:** Can I just clarify whether you think, in terms of the flow of Bills in the fourth Assembly, where it's fair to say the heavier Bills have come in the second half of this Assembly, that that's a normal pattern? I wasn't quite sure whether that's what you were saying or not in that response.

[51] **Mr Hughes:** To an extent, it is, because there's a limited amount of planning you can do ahead of a new Government.

[52] **David Melding:** Before an election.

[53] **Mr Hughes:** Yes.

[54] **Simon Thomas:** And before a referendum. We didn't know whether that was going to be won, or not.

[55] **David Melding:** It's fine. I don't think we need to labour the point. I think that's reasonable. So, in terms of how we are likely to see things in the future, it's probably going to be along those lines because of the length of consultation that the Government usually wants to do on big, big subjects.

[56] **Mr Hughes:** That's right. As I said, in general, we would probably find that happening. There may be an exception this time, because there's a lot of work that has to be done in anticipation of the tax powers. So, I think that we'll probably find that, at the beginning of the next Assembly, you will have plenty to do. [*Laughter.*]

[57] **David Melding:** Okay, we've tackled some tough and important areas there, which is my way of saying I've taken too long to put the questions, and I hope that we'll see a bit more pace from my colleagues, now. With that introduction, Suzy Davies.

[58] **Suzy Davies:** Thank you very much. You've talked about the length of time it takes for legislation to start coming as far as us here, particularly in this particular Assembly. But that does result in a few mistakes being made along the way, for different reasons and of different importance. I just wanted to take you through, really, the three factors that you say affect the drafting accuracy of completeness of a Bill on introduction. I think you've dealt pretty well already with the expertise of drafters and the challenges that bilingual legislation presents, but you do refer to there being a tension between the drafting cohort, shall we say, and the policy makers about the time it takes to develop the policy to be reflected in Bills, which actually then leaves you with what I presume you would say is very little time to actually get the drafting right. I presume things have developed over the last couple of years since we've had primary legislative powers here. Can you tell me how that process has worked and why things might be better now, in managing that time, than they were in, say, the first year of this Assembly—or second year, when we actually had some legislation?

[59] **Mr Hughes:** I should perhaps say that there isn't necessarily a tension between us and policy makers. I think, perhaps, there's tension between the need to progress and our desire as drafters of legislation to ensure that the text is as perfect as can be. I think that's inevitable; I think that's something that you would find anywhere. But, in terms of managing the process, I think there are various things in place now that we didn't have, or we had in a different form, perhaps, before. So, within the civil service, there's a board being created, a legislative programme board, which is made up of the most senior officials in the Welsh Government, and that oversees the process of timetabling and oversees the process of managing everybody's time and also ensuring that we have resource in the right place to

enable us to move as quickly as we can.

[60] Going back to this issue of tension, it's a tension to move on and to progress. We, as a civil service, need to make sure that we're not a hindrance to that and I think it's important that we do that. There are various mechanisms in place, as I say, to ensure that we've expanded the capacity of the civil service generally to deal with legislation, so it isn't just the office of the legislative counsel. The office of the legislative counsel, as I've mentioned, has expanded and there are now a lot more officials who are working on legislation, being trained on working on legislation and are developing the expertise that's needed. There's a link here to the resource, which is a big factor when it comes to time as well, so there is a link between time and resource, of course. So, I think that's a means of ensuring that we deal with that potential tension that exists between the desire to progress and to legislate and our desire to make sure we do it as well as we can.

[61] **Suzy Davies:** Well, I completely take your point on the number of people who you have involved here, and perhaps that has grown as well, but there also seems to be a realisation that actually getting the drafting right is equally as important as getting the policy right. I'm wondering, because that takes more time to get the drafting right, whether there's been a sort of—I don't know what I'd call it, really—reflux effect on the policy development side of things, because we've had evidence from other witnesses saying that they think that some of the mistakes that are coming through in the drafting are because policy is not very well developed, or is not developed as far as it might be. Do you find yourselves dealing with having to encapsulate in words something that you're not entirely sure about on a policy level?

[62] **Mr Hughes:** It depends what you mean by 'mistakes'.

[63] **Suzy Davies:** Well, they are the words of other witnesses, not mine. Errors, shall we say, then. Would that help?

[64] **Mr Hughes:** As drafters of legislation, we'll often hear, 'This Bill hasn't been drafted very well' or 'The drafting isn't good enough' et cetera. Those phrases are often used when what is really meant is that you disagree with the policy behind what's in the draft itself. So, I think that's one point to bear in mind. If what you're getting at is that you feel that there have been a need for too many amendments to legislation, then—

[65] **Suzy Davies:** Well, perhaps I can be a bit clearer, really. I'm just wondering, because the time for policy development has shrunk slightly, because, obviously, the need from your end of the process has increased—quite rightly, I suppose—whether you as drafters feel you occasionally have policy that you have to transfer into words but you're not really sure what the policy intention is.

[66] **Mr Hughes:** It is something that happens, yes, because that's part of the process. It's part of the process always that lawyers and drafters challenge the policy and seek to clarify it. So, the situation that you've described is something that I would say is commonplace, but there's nothing wrong with that, because that's the way the system works. That's how it's supposed to work.

[67] **Mr Davies:** I'd say that that is the system. The whole point of having a drafting office, or one of the main points of having a drafting office, is to challenge the assumptions that underlie the policy. It is through the process of producing the words that you really get to the root of what people are trying to achieve and the things that are missing and the things that are wrong. So, I mean, I've been to a number of commonwealth association conferences, where drafters get together and start talking about how difficult drafting is and sharing their sob stories and all that sort of thing, and the perennial issue is how to improve instructions—

how do we get the policy right before it gets to us? What I've concluded from all that is that this is just the way it is. This is the process of putting—. To put a piece of legislation together is a very, very difficult thing, and when you're at the policy development stage and you're putting together your ideas in your own language, it's impossible to think through all the things that you would need to think through to produce a piece of legislation that's perfect. It's only if you're going through the process of actually trying to turn that into a piece of legislation that you solve those problems.

[68] **Suzy Davies:** So, do you understand, then, why people—others who have given us written evidence in particular—are worried about the difference between the consultation documents that go out and the first draft of legislation, and where there seems to be, in their view, a mismatch between those? Then, that goes back to your question about why we seem to need so many amendments, not purely from an opposition perspective, but from the Government's own perspective, when it's been responsible for drafting the Bill. I'm just wondering if you understand the perception outside.

[69] **Mr Hughes:** To an extent, yes.

[70] **Suzy Davies:** What can we do to improve that bit of it then?

[71] **Mr Hughes:** An element of this, as Huw says, is that that is the system. One of the things that we'll often hear is that they would like us—. A number of times I've heard it said that it would be better if legislative counsel and lawyers were involved earlier in the process. I think that is definitely a way of improving that particular aspect of things, because we are able to accelerate that process of challenging things. I'd like to think that, in future, we will be able to get involved earlier in the process and bring our way of thinking to things. As Huw said, I think it's very difficult to expect policy officials to think about things in the way that we think about things, because we have developed an expertise over some time, both as lawyers and more lately as drafters of legislation. It's the development of a mindset almost and a discipline that understands what the law is and how it works. I don't think you can expect everybody to understand that. It's just not realistic.

[72] **Suzy Davies:** You've brought me to the answer I was hoping you'd give, so I think—

[73] **Mr Hughes:** Yes, okay. Very good.

[74] **Suzy Davies:** Just a final question from me. Somewhere in the evidence you say that certainly this committee routinely raises an objection in connection with how we deal with consequential amendments—I don't even think I need to repeat it really. This committee has concerns about the way each Bill that we seem to see deals with consequential amendments, simply because we—maybe it's just me—have an impression that sometimes Bills aren't fully developed anyway, and then we're obviously slightly concerned that anything could slip through in those consequential amendment clauses. As we have concerns, and they haven't all been met, although we've had improvements—I will say that—what do you think we can do at this stage to try and limit the inclusion of those, at least either with no process or the negative process being applied to them? Is there more openness at your end for affirmative procedure followed by negative procedure?

[75] **Mr Hughes:** Are you referring now specifically to the powers that give the Welsh Ministers the ability to make consequential amendments?

[76] **Suzy Davies:** Yes, I'm sorry, I haven't asked the question very well, and perhaps it would help if I put my glasses on, wouldn't it? Why do Government Bills routinely include sections that permit Welsh Ministers to make consequential provisions, without what we would consider appropriate scrutiny? That's probably the better way of putting it.

[77] **Alun Davies:** Some of us might consider—[*Inaudible*.]

[78] **Suzy Davies:** Some of us have never been a Minister.

[79] **Mr Hughes:** I think, first of all, there would be, to my mind, appropriate scrutiny. There are two questions here, aren't there? There's the question about having the power in the first place. In fact, there are possibly three questions. There are the situations where we don't have consequential amendments on the face of a Bill and you simply have a power to make consequential amendments after the event. Then, there's the third question of what the procedural process is for making the statutory instrument that would follow. So, probably from your perspective, the 'worst' situation is where we don't have any consequential amendments on the face of the Bill and there's simply the power there. The power itself, some may say, is another safeguard; it's another attempt at being able to remedy the situation after the event. From my perspective, I'd rather have it, because it means that we're able to more easily deal with any situation that may arise afterwards. I should say that these powers are limited. They are limited to things that are consequential. They can't be used to do anything that's contrary to the intentions of the Bill itself. There are often very good reasons for having it, because the legislative framework that we're working within may be very complex. There may not have been sufficient time to trawl legislation in the way that we would be satisfied with. But, then there are also situations—Huw can mention one of them—where it would probably be unavoidable because of what was happening elsewhere. So, for example, in the Social Services and Well-being (Wales) Bill, at the same time you had the Care Bill going through Parliament in Westminster. Huw will elaborate on this. There was no other way of dealing with it.

14:15

[80] **Suzy Davies:** Could I come in just very quickly, because it'll probably help you with your answer actually? I accept what you say, there are obviously going to be situations where that occurs but, because we see so much secondary legislation, well, so much power put into secondary legislation, which itself can then invoke the type of section we are talking about in the primary legislation, you can understand perhaps why we get a little concerned that ministerial powers aren't more fleshed out before we actually get as far as primary legislation. That could always be a backdoor concern for us, but I'm more than happy to listen to Mr Davies on—

[81] **Mr Davies:** I understand your concern, and it's a point, really, that you, as Assembly Members, have to press. You need to decide for yourselves how much you want the Government to do. Is the answer they're giving in that particular context on that particular power convincing enough—

[82] **Suzy Davies:** Sometimes it is, yes.

[83] **Mr Davies:** —for you to be satisfied that it's appropriate. I was really just going to give an example of a situation where it is entirely appropriate to give quite a wide power to do consequentials by Order, and that was in the Social Services and Well-being (Wales) Bill, now the Act, and the Care Act 2014 that was before the Westminster Parliament. We were both legislating in the same area at the same time, so both Bills were adjusting, or radically reforming, the system for social care. In our case, we were changing the system applicable to children as well as adults. The Westminster Bill was principally concerned with adults. The issue that made it absolutely essential that both Bills had a power of that kind was that we didn't know at the point at which the Bill was being settled which of us would commence the Act first, because that was something that would be some time after Royal Assent, assuming the Bills got Royal Assent. So, because we weren't sure when they'd be commenced, you

couldn't decide exactly how to draft the consequential amendments because you would draft by reference to what had been done for England first or for Wales first. So, in that case, there was no option for both Bills but to include a power to do the consequentials after the Bills had been enacted.

[84] **Suzy Davies:** But there are other examples—I think we had a witness, last week, was it? I don't want to labour the point. I'll tell you what, I'll leave it. It's okay, thank you.

[85] **David Melding:** We can probe this whole issue of when secondary legislation is appropriate, and we could go back to that particular issue of consequentials then.

[86] **Suzy Davies:** Okay, thank you.

[87] **David Melding:** On this drafting point, when the Bill is then before the Assembly for its detailed scrutiny—. I thought there was a very interesting piece in the Welsh Government's evidence about the challenge you then face with non-Government amendments, particularly from a technical point of view. They basically don't fit into the scheme you've developed because of the way they've been drafted. First of all, if that's true, it's highly disabling of the legislative function here and it's clearly not a satisfactory situation. What should be done about that? Is it about a lack of capacity or the technical way our lawyers give advice on amendments, or is it the depth of the policy consequentials that go through all different types of legislation that you are more familiar with? How do we resolve that? If you really look at our law making so far, we've not passed many amendments from the non-Government side at all and very few on substantial matters. Now, this may be typical of legislatures that follow the Westminster system, but I suspect that, even allowing for that weighting, we don't do very well. So, do we have a fundamental problem here?

[88] **Mr Hughes:** There are a couple of things here. Just to go back to the point about why there is an issue, the document itself is a complex document most of the time. It's almost like a—

[89] **David Melding:** I mean, I can understand all that, and if it was like casual amendments where, you know, I got to my office and think about things for an hour and then dash a few things off—. But, most amendments that are presented have gone through a pretty rigorous system here, and advice and all that. You know, there's a level of due diligence that is given, so let's take it that that's the basis.

[90] **Mr Hughes:** There is, but, to an extent, I would argue that it's much more difficult for the person who hasn't drafted it in the first place, because the legislation has been put together in a particular way, it's got a particular vocabulary, it's got a particular pattern of the use of words and it's not always apparent to somebody who's picking up that document afterwards, or it isn't easily apparent sometimes. So, that's the reason why there are difficulties. The other aspect to this is that something that might be completely plausible at first sight might not work in practice as a matter of policy. Now, that's something that we wouldn't necessarily know either, but you have the machinery of Government that would be able to tell you that, and therefore—

[91] **David Melding:** Now we get into the realms of the subjective here, don't we?

[92] **Mr Hughes:** Well, there is an element of subjectivity—

[93] **David Melding:** The opposition and the Government might have different views on that.

[94] **Mr Hughes:** I should say that there have been a number of non-Government

amendments. We've been involved in working with opposition parties to hand out amendments. So, once political agreement has been reached, there have been a number of situations where we have actually drafted the amendments for the opposition Members to lay. So, I'm not sure that I fully agree with that. The other aspect of this is that, in comparison to Westminster, for example, where you've got up to seven amending stages, it's a lot easier to have a probing amendment and to have an amendment that is intended essentially to be the catalyst for a political discussion. In our case, we generally have two amending stages, and so I think it's more important that the amendment is technically correct, because we don't necessarily have a means of rectifying it. In looking at what happens elsewhere in addition, it's quite commonplace elsewhere for drafting offices to draft hand-out amendments, but also there are other ways of doing this. So, for example, in New Zealand, the Parliamentary Counsel Office is a statutory body that also works for the New Zealand Parliament. So, they have Chinese walls within the office to ensure that that works. New South Wales is another example; it has a memorandum of understanding with the New South Wales Parliament. So, again, the drafting office drafts the amendments for non-Government members.

[95] **David Melding:** I suppose what I'm after is more of an impressionistic sense of: do we have a problem or not? I commend the Government and everyone who's appeared before this committee for their candour. I mean, it's been refreshing, but, when I read that in the draft, I thought, 'Crikey'. If I was a Government Minister and I'd read that paper I probably would have put a red line through it to make a statement as direct as that: that it's actually quite difficult for non-Government Members to even construct an amendment that is grammatical in policy terms.

[96] **Mr Hughes:** It's difficult but it's not impossible. There are means to do it.

[97] **Mr Davies:** Could I just give you an example of the sort of thing that—? I've been working on the violence against women Bill, and there are some recent amendments laid to that Bill. A number of amendments—ones that relate to education, in particular—are plausible. When you read them as English, they are plausible things that make sense to people who understand the English language. But, the difficulty is that they don't connect directly with how the education law actually works. So, there are fundamentals about how the education system is constructed, like the fact that proprietors of independent schools and governing bodies are the actual decision makers—

[98] **David Melding:** I'm sorry to interrupt you, but, you know, the really difficult thing about this line of argument is you end up concluding that, in a modern society, the Westminster legislative process just can't really work. You know, it's the Government, really, that can do it. The Government has the skill set and, boy, we do have a problem when it comes to line-by-line scrutiny. I mean, that's what we're trying to probe here. I am not convinced that that's the situation, but I think we need to put it to you just because of—

[99] **Mr Hughes:** I don't think that's the case. As I say, there are a lot of non-Government amendments being made.

[100] **David Melding:** There aren't many that are carried. I think I'm fair in saying that. As I said, in the Westminster system, this is one of the challenges if you're not in government, to influence legislation, and yet the legislative function is one of the great spheres of government.

[101] Can I then just say that one weakness, it seems, in our model is that, at Stage 3, sometimes a Government Minister will say, 'I completely accept the principle of this', or will say at Stage 2, you know, 'You need to leave it to us and we will reflect on it and then come back with an appropriate amendment'? This, again, takes all the power from the legislature. I just wonder whether it would be better if the Government took on face value all amendments

and, if there's really a problem, came back at the final stage to remove those amendments, which, in a Parliament that's split 30:30, or 29:29 in voting numbers, would mean that the legislature would then have much more power over the draft. I just wonder whether you think the Report Stage might be a way of doing some of that and of dealing with some of these issues.

[102] **Mr Hughes:** It's a matter for the Assembly, really. I don't really want to get drawn too much into some of these procedural aspects and the political aspects of it.

[103] **David Melding:** Okay. Perhaps we've gone as far as we can on these. Simon.

[104] **Simon Thomas:** Mae gen i jest un cwestiwn, rwy'n meddwl, sy'n atodol i'r drafodaeth rydym newydd ei chael. Rydym wedi cael un Bil brys, a dau set o ddeddfwriaeth sydd wedi mynd drwyddo heb ran gyntaf yn cael ei chyflawni. A ydy hynny'n golygu dulliau gwahanol o weithio gyda chi?

Simon Thomas: I have just one question, I think, which is related to the discussion that we've just had. We've had one emergency Bill, and two sets of legislation that have gone through without Stage 1 being completed. Now, does that mean a different approach of working for you?

[105] **Mr Hughes:** Mae'n gallu bod. O ran y Bil brys, cafodd hwnnw ei ddrafftio ar frys, felly roedd yn golygu bod yn rhaid i ni wneud yn siŵr bod gyda ni'r adnoddau ar gael i weithio, ac roedd lot o oriau hir a lot o nosweithiau hir wedi mynd i mewn.

Mr Hughes: It can do, yes. In terms of the emergency Bill, that was drafted as a matter of urgency, and therefore that meant that we had to ensure that we had the resources available to do that, with many long hours and late nights.

[106] **Simon Thomas:** Felly, rydych chi, yn llythrennol, yn gorfod tynnu pobl mewn, efallai, oedd yn—

Simon Thomas: So, you quite literally have to draft people in, perhaps, who were—

[107] **Mr Hughes:** Wel, yn y sefyllfa yna, roedd yn rhaid i ni stopio—fel y dywedais i'n gynharach, o wythnos i wythnos, rydym yn gwybod yn union beth mae pob aelod o'r swyddfa'n ei wneud, ac, yn yr achos yna, roedd yn rhaid i ni stopio gwneud pethau eraill er mwyn sicrhau ein bod ni'n drafftio'r Bil hynny. A'r gwahaniaeth arall, wrth gwrs, oedd bod camau 2 a 3 wedi cael eu gwneud yn gyflym iawn hefyd, felly roeddwn i yma, er enghraifft, yn helpu o ran sicrhau bod rhywun ar gael i wneud drafftio ar frys, sydd ddim yn rhywbeth rydym yn ei wneud yn gyffredinol. Felly, eto, roedd hynny'n ffordd wahanol o weithio.

Mr Hughes: Well, in that situation, we had to cease—as I said earlier, on a week-to-week basis, we know exactly what every member of the office is doing, and, in that case, we had to cease other activities in order to ensure that we could draft that particular Bill. And the other difference, of course, was that Stages 2 and 3 had to be undertaken very swiftly too, so I was here, for example, helping in terms of ensuring that there was someone available to carry out emergency drafting, which isn't something that we regularly do. So, again, that was a different way of working.

[108] **David Melding:** William.

[109] **William Powell:** Thank you very much, Chair, and good afternoon. I'd like to focus in my questions on the area of terminology within legislation. It would be very helpful for us if you could share your views on the role of the Welsh Government in developing and sharing terminology, both in Welsh and English, and whether you feel that the inclusion of an index of the defined words and expressions, as was the case in the Education (Wales) Act 2014, is likely to become more common in future.

[110] **Mr Hughes:** Good afternoon, first of all. They're two slightly different points, I think. There's the technical aspect of using an index—it's a drafting tool, ultimately—and then there's the question of developing terminology. So, developing terminology is something that we would do in general, because we're developing Welsh law, but, I suppose, most significantly it's in the area of the Welsh language that we would have quite a prominent role. So, if you look back over the 16 years or so, we have developed a body of terminology for Welsh-language terms. The Welsh Language Commissioner also has a role in that respect, but a lot has been done to develop terminology, and we are part of that process. So, the terminology is developed, depending on the circumstances, by the policy officials, who best understand the meaning of the word, and by our legislative translators, and by us, giving the legal perspective. I should say, by the way, that the head of our legislative translation unit, or the chief jurilinguist, as he's termed, is legally qualified and he's able to give a perspective of his own. He's also been involved since 1999, so he has a high degree of expertise.

[111] The index is a slightly different point, as I say, because that's a drafting tool. I think the example that you mentioned is perhaps a little bit different to what we normally do, because I think, from memory, that, in that case, we had an index that was introduced by the overview section. So, very early on, you were referred to this schedule that informed you of each of the defined terms. That in itself isn't particularly novel—you know, we'll frequently have an index, in effect, as part of the interpretation section, so, at the end of each Bill, you'll find that kind of provision. We've also developed a process of having a lot of key terms defined upfront, so as to help the reader to understand the story. So, that's something that we adapt to depending on the circumstances. But if that particular example is something that appeals to Members, if it's something that helps, it's certainly something that we can consider doing more of in the future.

14:30

[112] **William Powell:** Okay. That's helpful. Also, do you consider that there's a case to be made for an interpretation Act in Wales and, if so, what could and should it include?

[113] **Mr Hughes:** This is an interesting question. I think there are two aspects to it. The first is that we have the Interpretation Act 1978. That has a list of defined terms in the Schedule and has a number of phrases that have particular effect in all legislation, unless the contrary intention appears, and we don't have that in Welsh. So, it's clear to me that that's a little bit of an anomaly and that we should have the same application for the Welsh terms.

[114] Going beyond that is a more difficult question, because there are two schools of thought as to whether we should have our separate Welsh interpretation Act, like they've done in Scotland. So, as things currently stand, there is a Scottish interpretation Act, there's also a Northern Ireland interpretation Act; there isn't a Welsh interpretation Act. But it's not straightforward. You know, it's appealing to think, 'Well, there should definitely be a Welsh interpretation Act' and it's something that I certainly—from a personal perspective, that appeals to me. But, from a technical perspective, some people would argue that that isn't necessarily helpful. Some people don't think that interpretation Acts are helpful, anyway. I suspect that a number of lawyers have never even heard of the Interpretation Act—some in private practice. So, I think that there is an argument to say that you shouldn't have an interpretation Act, and that you should always know what the legal position is from the Bill itself. Having said that, the type of things that you have in interpretation Acts are quite technical and, I think, on balance, it does help to have them, because you deal with particular situations, so, for example, when something is—. What does 'postal service' mean and things of that nature? It also has some technical provisions that go beyond the meaning of certain words.

[115] But the difficulty of having a Welsh interpretation Act would be that you then have another interpretation Act; you've got issues around which interpretation Act applies. So, if, for example, we amend a UK Act of Parliament, which interpretation—. You know, you have to deal with questions like, 'Well, which interpretation Act should apply?' and whilst you can do that, of course, there is a potential for confusion that's created by having another interpretation Act.

[116] **William Powell:** Do you think it would be beneficial for us to have an interpretation Act here in Wales if a separate Welsh jurisdiction were to be established at some point in the future?

[117] **Mr Hughes:** Yes. I think that—. Much of this depends. At the moment, the jurisdiction is one element of it, but part of the problem is that our legislation is so closely intertwined with the legislation that also applies to England and I think that's probably the key to this. The more separate that you have, as a Welsh body of law, the easier you can put forward the argument for a Welsh interpretation Act.

[118] **William Powell:** Okay, thank you. Finally from me, what are you views on the legislative drafting software that's jointly been prepared with the Assembly?

[119] **Mr Hughes:** We've had the legislative drafting software since 2011. It is, generally speaking, an improvement on what we had before. But there are problems with it and I think they're probably problems that affect us more than those working in the Assembly Commission, and more than it affects the clerks. That's partly because we have to be responsible for the content of the text. Now, I'll get on to this in a minute. It's actually quite a difficult process to go through when you're amending Bills and when you're preparing amendments.

[120] We've had problems with its stability; it crashes a lot, it tends to crash when you least want it to crash, because you're working at 10 o'clock at night at home, or whatever you're doing. That isn't necessarily a problem with the software itself, you know; we've had some difficulties in establishing why that's happening and it may have nothing to do with the software. But the software itself is, I would say, a little bit temperamental, meaning that you have to do certain things in exactly the way it wants you to do them, and sometimes that's counter-intuitive. So, it's very easy to get things wrong. The kind of legislative drafting software that we would prefer to have is software that doesn't actually allow you to do things incorrectly, and that kind of system does exist. It's a little more closed system that simply doesn't allow you to format the Bill incorrectly. This is quite technical, and I'm in danger of boring you already, I think, but there are various aspects of this where we have to get the formatting exactly right, otherwise the automation of the process in the amending stages doesn't work. That's why the clerks, quite rightly, are very concerned about making sure that everything is right up front, and it's—. I'll just say that it's easy to get it wrong.

[121] Probably the most important aspect of this is the way that the amendments are put together in the software. So, on the face of it, it's something that should work very well; it's a process where you bring up the Bill as it stands, and you type in the amendment, and it creates a tracked change of the amendment, and it automatically generates the instruction, which generates the list that you, as Members, see. Now, that sounds great, but, in practice, unfortunately, it doesn't work that well, and the main problem from our perspective is that you can only have a limited number of amendments in each file that's generated. So, we have to generate a file that produces amendments, and in a large Bill where you have lots of amendments you sometimes have to create up to 30 files. The way I try to explain this to people is: let's say you're being asked to produce tracked changes to a document, so you have quite a lengthy document, say 50 to 60 pages, and you want to make changes to it, so, ordinarily, you would pick up the document and start typing away, the tracked changes would

appear, you send it back and everybody understands what you have done to the document. When we do that, we start making some tracked changes—so, we'd start making about 10 changes—and then we have to stop, and we have to close the document and then start again. So, if you think about doing that 20 times, and then you also think about the mental process of making sure that all of those 20 files that all contain important changes to law, potentially, if they're voted through—you have to be clear that you've incorporated everything. So, what that means, because that is so difficult for us to do, is we have to produce—in effect, we've created a process outside of the software in order to keep track of things. So, to all intents and purposes, we're doing things twice or even three times over, and that impacts on the rest of the time that we have to produce amendments.

[122] **William Powell:** That's very helpful, actually, to take us through that process you've just described. Thank you very much.

[123] **David Melding:** Now we will finally talk about the balance of primary and secondary powers, and I'll ask Simon to lead the charge.

[124] **Simon Thomas:** Diolch, Gadeirydd. Yn wir, os oes un pwnc mae Aelodau Cynulliad yn teimlo'n fwyaf cryf yn ei gylch mai'r hyn sydd ar wyneb Bil yw, a'r hyn sy'n cael ei gynnwys mewn deddfwriaeth eilaidd, a'r dewisiadau sy'n cael eu gwneud rhwng y ddau. Yr ymdeimlad gan lawer—nid pawb, ond llawer—yw yn aml iawn mae diffygion meddylfryd polisi sydd tu ôl i hwn, a bod y Llywodraeth yn gofyn i'r Cynulliad ddeddfu ar egwyddorion heb feddwl drwyddo, weithiau, beth sydd yn mynd i ddod yn y ddeddfwriaeth eilaidd. Nid wyf yn disgwyl i chi wneud sylw ar hynny, ond byddwn i'n licio gwybod gennych ba rôl yn union mae'ch swyddfa chi yn ei chwarae wrth wneud y penderfyniadau hyn, ac wrth gyfeirio at ddeddfwriaeth sylfaenol yntau ddeddfwriaeth eilaidd.

Simon Thomas: Thank you, Chair. Indeed, if there is one subject that Assembly Members feel most strongly about it's what's on the face of a Bill and what is in secondary legislation, and the choices that are made between the two. The feeling among many—not everybody, but many people—is that, often, it's deficiencies in policy thinking that are behind this, and that the Government is asking the Assembly to legislate on principles without thinking through, sometimes, what's going to come in the secondary legislation. I'm not expecting you to make a comment on that, but I would like to know what role your office plays in making these decisions, and in referring to primary legislation or secondary legislation.

[125] **Mr Hughes:** Yn gyffredinol, fe fyddem ni'n derbyn cyfarwyddiadau sydd yn dweud beth yw'r bwriad polisi a fydd, yn gyffredinol—

Mr Hughes: Generally speaking, we would receive instructions that would tell us what the policy intention was, that would, generally—

[126] **Simon Thomas:** Reit ar y cychwyn, fe fyddai fe'n dweud.

Simon Thomas: Would that be at the very outset?

[127] **Mr Hughes:** Byddai'r cyfarwyddiadau'n dweud—. Bydden nhw'n gofyn inni gynhyrchu pŵer er mwyn i'r Gweinidogion allu deddfu ar ôl hynny i roi fwy o fanylder, efallai, neu beth bynnag. Mae'n dibynnu, wrth gwrs, ar y sefyllfa. Weithiau, mae'n jest mater o roi mwy o fanylder. Weithiau mae'n bŵer i allu diwygio beth sydd wedi cael ei roi ar wyneb y Bil yn y lle cyntaf. Felly, o'n rhan ni, ac wrth beidio

Mr Hughes: Well, yes indeed. The instructions would say—. They would ask us to actually produce a power so that Ministers could legislate in order to provide more detail, perhaps, or whatever the intention was. It depends on the situation, of course. On occasion, it is a matter of just providing more detail. On another, it may be a power to amend what's been put on the face of the Bill initially. So, from our point of view, and

mynd mewn i'r ochr wleidyddol o hyn, byddwn yn dweud bod gyda ni rôl weithiau yn cwestiynu beth sydd yn cael ei wneud. Os oeddem yn teimlo bod e'n mynd i amharu ar ein gallu ni i esbonio beth sy'n digwydd, yn sicr, byddem yn gwneud y pwynt hynny. A byddem hefyd yn cyfeirio pobl at beth byddem yn ystyried byddai barn y pwyllgor. Rydym wedi clywed yn aml beth yw barn y pwyllgor ar y materion hyn. Felly, mae rôl gyda ni i bwyntio allan, 'Wel, ar y Bil yma, dyma beth ddywedodd y pwyllgor' fel bod pawb yn gwybod beth sydd wedi cael ei ddweud mewn sefyllfa tebyg yn y gorffennol.

seeking not to get into the political side of this, I would say that we have a role occasionally in questioning what is being done. If we felt that it was going to have an impact on our ability to explain what was happening, then, certainly, we would make that point. And we would also refer people to what we would think the committee's view would be. We've often heard the committee's view on these issues. So, we have a role in pointing out, 'Well, on this Bill, this is what the committee said' so that everyone is aware of what has been said in similar circumstances in the past.

[128] **Simon Thomas:** Yn y cyd-destun hwnnw, felly, pa mor bell ydy eich rôl chi yn mynd o safbwynt nid yn unig y deddfwriaeth eilaidd, ond y penderfyniad i rai pethau ymddangos mewn cyfarwyddiadau neu ganllawiau statudol—deddfwriaeth o fath ond deddfwriaeth sydd yn sicr ddim mor agored i ddiwygio neu wella gan y Cynulliad? A ydych chi'n chwarae rôl yn hynny o beth o gwbl?

Simon Thomas: In that context therefore, how far does your role extend in terms of not only the secondary legislation, but also the decision for some things to appear in guidance or statutory guidance—a kind of legislation, but not legislation that is as open to being amended or improved by the Assembly? Do you play a role in that at all?

[129] **Mr Hughes:** I raddau, eto. Mae'n debyg, i fod yn onest. Beth rydym yn siarad am fan hyn yw system sydd yn cael ei greu o'r dechrau. Felly, bydd yna fwriad, bydd yna benderfyniad yn cael ei gymryd; byddant yn ystyried ym mha ffordd mae nhw eisiau creu system o ddeddfwriaeth, ac, wrth gwrs, nid yw wastad yn ymwneud â Bil yn unig. Bydd yna asesiad yn cael ei wneud o beth sy'n briodol, pa fath o hyblygrwydd sydd ei angen, ac i ba raddau bod angen efallai i beidio â chyfarwyddo pobl i wneud pethau ond i'w hannog nhw i wneud pethau. Felly, eto, mae'n dibynnu ar y sefyllfa. Ein rôl ni yn y math yna o beth yw, eto, i ddweud os ein bod ni'n teimlo bod hynny'n addas. Felly, y rôl mwyaf pwysig byddem yn ei chymryd efallai yw i ddweud—. Er enghraifft, petai rhywun yn dweud ei bod nhw am roi gallu i Weinidogion, i bob pwrpas, gyfarwyddo pobl i wneud rhywbeth trwy ganllawiau, byddem yn pwyntio allan nad yw hynny'n briodol; mae'n rhaid bod yn onest ynglŷn â beth yn union yw natur y pŵer, ac efallai byddem yn dweud yn fwy cyffredinol ein bod ni'n teimlo nad yw'n addas i'r Gweinidogion i gael y pŵer yna, gan ddibynnu ar y sefyllfa.

Mr Hughes: To an extent, again. It is similar, to be honest. What we're talking about here is a system created from the outset. So, there will be an intention, a decision will be taken; they will consider how they want to create that system of legislation, and, of course, it is not always going to relate to a Bill alone. An assessment will be made of what is appropriate, what kind of flexibility is required, and to what extent there is a need to perhaps not direct people to do certain things, but encourage them to do things. So, again, it depends on the situation. Our role in that kind of scenario is, again, to say whether we feel that's appropriate or not. So, the most important role that we would take perhaps is to say—. For example, if someone were to say that they wanted to provide Ministers with the ability to, to all intents and purposes, direct people to do things through guidance, then we would point out that that isn't appropriate; you have to be honest about what the nature of the power is, and we might say more generally that we do not feel it would be appropriate for Ministers to have that power, depending on the situation.

[130] Felly, dyna'r math o beth byddem yn

So, that's the kind of thing we would do. But,

ei wneud. Ond, eto, heb fynd yn rhy wleidyddol, mi wnes i ddefnyddio'r gair 'system' ar bwrpas achos nid oes unrhyw beth anghyffredin mewn creu system, ac, o'n rhan ni, yn aml ni fyddem eisiau gormod o fanylder ar wyneb Bil achos byddem yn teimlo efallai nad yw hynny'n addas. Rydym yn trio cyfleu'r prif stori, ac yn trio esbonio beth yw'r prif newidiadau yn y gyfraith. Felly, yn yr un modd ag y byddem yn defnyddio atodlenni, er enghraifft, pan fo pethau sydd yn torri i fyny ar y stori rydym yn trio ei dweud, eto, mae rhai pethau lle y byddem yn dweud, 'Wel, mae hynny'n fath o fanylder sydd jest yn mynd yn rhy bell, ac mae gyda ni system fan hyn'.

again, without getting overly political, I used the word 'system' deliberately because there is nothing unusual in creating a system, and, from our point of view, often we wouldn't want too much detail on the face of a Bill, because we would feel that perhaps that wouldn't be appropriate. We're trying to tell the main story and trying to explain the main changes to the law. So, just as we would use schedules, for example, where there are things that interrupt the story that we are trying to tell, again, there are some things where we would say, 'Well, that's the kind of detail that just goes too far, and we have a system here'.

[131] Rwy'n credu efallai un peth y gallem edrych arno yw'r ffordd y mae'r system yna yn cael ei gyhoeddi a pha mor hawdd yw e i gael gafael ar ddeddfwriaeth, neu i wybod a oes deddfwriaeth eilradd yn bod, a'r ffordd y mae hynny yn cael ei wneud. O ran cyhoeddi, y ffordd mae hynny—o edrych ar y Ddeddf sydd wedi cael ei phasio, pa mor hawdd yw e i edrych lawr y system ac i weld lle mae popeth arall wedi cael ei wneud; felly, os oes yna Ddeddf, os oes yna ddeddfwriaeth eilaidd, ac os oes canllawiau neu beth bynnag, bod hynny'n hygyrch. Ac rwy'n credu, yn y Deyrnas Unedig yn gyffredinol, byddai pawb yn derbyn nad yw hynny'n cael ei wneud yn dda iawn.

I think one thing that we could look at is how that system is made public and how easy it is to access legislation, or to know whether subordinate legislation exists, and the way in which it is made. In terms of publication, the way that that—in looking at the Act that has been passed, how easy it is to look down through the system and see where everything else has been made; so, if there is an Act, if there is subordinate legislation, and if there are guidelines and so on, that they are accessible. And I think, in the United Kingdom generally, everyone would accept that that isn't done particularly well at the moment.

[132] **Simon Thomas:** Mae'n atgoffa fi o rywbeth wnaethoch chi ei ddweud reit ar ddechrau'r dystiolaeth, a dweud y gwir. Roeddech yn sôn am y cof corfforaethol mewn ffordd. Un o beryglon yr hyn rydych wedi ei ddisgrifio, mae'n ymddangos i fi, yw bod modd, dros gyfnod, i ryw fath o *mission creep* bron i ddod i mewn i'r cwestiwn, lle rydych yn dechrau ar ddechrau un Cynulliad gydag un math o ddeddfu ac un math o gydbwysedd rhwng sylfaenol ac eilaidd, ond dros gyfnod, os nad ydych chi'n ofalus—os nad oes rhywun yn cadw'r pyrth, fel petai—gallwch chi symud at system lle mae newid yn y pwyslais wedi digwydd.

Simon Thomas: That reminds me of something that you said right at the start of the evidence, to be honest. You were talking about the corporate memory in a way. One of the risks of what you've described, it appears to me, is that it is possible, over a period of time, for a kind of mission creep to come into this, where you start at the start of one Assembly with one kind of legislating, and one kind of balance between primary and secondary, but over a period, if you're not careful—if no-one is acting as gate-keeper, as it were—you can move to a system where a change in emphasis can happen.

14:45

[133] Efallai nad oes neb wedi cymryd y penderfyniad gwleidyddol neu fod penderfyniad gan y Cynulliad i hynny

Maybe no-one has taken the political decision or no decision has been made by the Assembly for that to happen—it's just

ddigwydd—mae jest wedi digwydd oherwydd y system. A ydych chi'n cydnabod y perygl yna, ac a oes yna rywbeth i ddiogelu neu o leiaf rybuddio bod hynny'n digwydd yn y system?

happened because of the system. Do you recognise that risk, and is there anything to safeguard or at least to warn us that that's happening within the system?

[134] **Mr Hughes:** Mae'n gallu digwydd, ond nid wy'n siŵr faint o berygl yw e. Wrth gwrs, dyna un o'r pethau rŷch chi'n ei wneud fel pwyllgor yw edrych ar bethau fel yna. Byddwn i'n tueddu i feddwl ei fod e jest yn dibynnu ar y sefyllfa, ac ar beth yn union i'w wneud mewn unrhyw Fil. Yn sicr, nid wyf wedi gweld unrhyw dystiolaeth bod hyn yn cael ei wneud ar bwrpas.

Mr Hughes: It could happen, but I'm not sure how much of a risk it is. Of course, that's one of your roles as a committee to look at those issues. I would tend to think that it just depends on the situation, and what exactly to do with any particular Bill. And, certainly, I haven't seen any evidence that this has been done deliberately.

[135] **Simon Thomas:** Na, na, nid wy'n awgrymu hynny am y tro, ond un cwestiwn sy'n dod yn sgil hynny, wrth gwrs, yw: a ydy e'n dibynnu ar y Gweinidog? A ydych chi yn synhwyro bod gan Weinidogion ymdeimlad gwahanol ar gyfer y math yma o gydbwysedd hefyd? Hynny yw, a oes gan y Llywodraeth gysyniad corfforaethol, neu a ydy e'n gallu amrywio o adran i adran, os nad o Weinidog i Weinidog? Nid wy'n disgwyl i chi enwi neb—rwyf jest eisiau cael ymdeimlad o sut beth yw'r broses yma.

Simon Thomas: No, no, I'm not suggesting that for the time being, but one question that stems from that is: does it depend on the Minister? Do you sense that Ministers have a different feeling for this kind of balance as well? That is, does the Government have a corporate idea, or does it vary from department to department, if not from Minister to Minister? I'm not expecting to you name names here—I just wanted to get a feeling of what the process is.

[136] **Mr Hughes:** Mae'n gallu amrywio o Fil i Fil. Fyddwn i ddim yn meddwl ei fod e'n gallu amrywio yn benodol o Weinidog i Weinidog. Un peth arall rŷch chi'n gorfod ei ystyried yw rôl y Cwnsler Cyffredinol yn hyn, a rôl y Prif Weinidog. Maen nhw'n goruchwylio beth sy'n digwydd o ran hynny, ac maen nhw wastad yn gweld beth sy'n digwydd, felly mae modd iddyn nhw i wneud sylwadau hefyd.

Mr Hughes: It can vary from one Bill to another. I wouldn't have thought that it would vary from one Minister to another. One of the things that you need to take into account is the role of the Counsel General in all of this, and the role of the First Minister too. They have an overview of that, and they are always aware of what's going on, so they could comment too.

[137] **Simon Thomas:** Ocê. A allwn ni jest symud ymlaen ychydig i fath arall o beth rŷm ni wedi derbyn tipyn o dystiolaeth arno, sef i ba raddau y gallwn ni ailddatgan mewn cyfraith Cymru y darpariaethau sydd eisoes yn bodoli. Fel rydych chi newydd ei ddisgrifio, rŷm ni mor agos yn hanesyddol, cyfraith Cymru a Lloegr gyda'i gilydd, ac mae sawl tyst wedi bod yn feirniadol neu o leiaf wedi cwestiynu pam ein bod ni wastad—ddim wastad, ond yn aml iawn mae'n rhaid i chi fynd yn ôl at ryw Fil sydd efallai yn 20 mlynedd oed, fel y Bil addysg uwch yn ddiweddar, er enghraifft. Mae'n rhaid i chi fynd yn ôl at Fil 1992, neu pryd

Simon Thomas: Okay. Could we just move on now to another kind of thing that we've had quite a bit of evidence on, namely to what extent we can restate in Welsh law those provisions that already exist. As you have just described, we are so close, historically, with Welsh and English law bound together, and several witnesses have been critical or have at least questioned why we always—not always, but very often we have to go back to some Bill, which may be 20 years old, as with the higher education Bill recently. You have to go back to the 1992 Bill, or whenever it was, in order to understand the Welsh Bill. To what extent

bynnag oedd e, er mwyn deall Bil Cymru. I ba raddau y dylem ni fod yn ceisio, o leiaf, i ddeddfwriaeth Cymru sefyll ar ei phen ei hun, neu'n fwy ar ei phen ei hun, beth bynnag?

should we at least be trying to ensure that Welsh law can stand alone, or stands alone a bit better, at least?

[138] **Mr Hughes:** Mae hwn yn mynd yn ôl eto i ddechrau'r Cynulliad yma. Rwy'n credu bod record dda gyda ni yn hyn o beth. Efallai nad yw'n ymddangos felly, ond rwy'n credu ein bod ni wedi cymryd lot o benderfyniadau, ac mae lot o'r penderfyniadau hynny wedi cael eu dylanwadu gennym ni yn y swyddfa, i ailddatgan darpariaethau. Gwnaeth y Cwnsler Cyffredinol ddatganiad ar hyn nôl yn 2012, rwy'n credu, lle gwnaethom ni'r addewid, lle bo hynny'n ymarferol i'w wneud, y byddem ni'n ailddatgan.

Mr Hughes: Again, this goes back to the beginning of this Assembly. I believe that we have a good record in this regard. It might not appear that way, but I believe that we've taken a lot of decisions, and many of those decisions were influenced by us in the office, to restate provisions. The Counsel General made a statement on this back in 2012, I believe, where we made an assurance that, where it is practicable to do so, we would restate provisions.

[139] **Simon Thomas:** Nid yw'n digwydd yn ddi-ffael, serch hynny.

Simon Thomas: It doesn't happen without fail, does it?

[140] **Mr Hughes:** Nid yw e'n digwydd wastad. Mae yna esiamplau lle byddai fe jest ddim wedi bod yn ymarferol. Mae'r Bil cynllunio yn esiampl dda o Fil sydd, rwy'n credu yn ei gyfanrwydd, yn diwygio'r ddeddfwriaeth sydd yn bodoli eisoes, ond mae Comisiwn y Gyfraith yn edrych ar broject, felly mae yna fwriad i gydgrynhoi deddfwriaeth cynllunio yn y pen draw. Pe bai modd, byddai hynny'n rhywbeth y byddai'n rhaid inni ei ystyried, ond byddai fe ddim wedi bod yn ymarferol i wneud hynny. Mae'r ddeddfwriaeth bresennol mor eang mewn rhai sefyllfaoedd fel bod hynny fwy neu lai yn amhosibl. Mae addysg yn esiampl dda. Mae yna rywbeth fel 22 o Ddeddfau seneddol sy'n ymwneud ag addysg, rwy'n credu bod yna bedwar Mesur ac mae yna dair neu bedair Deddf o'r Cynulliad. Felly, yn y sefyllfaoedd hynny, mae'n rhaid cwestiynu hefyd ba bwrpas fyddai yna i ailddatgan rhai pethau. Mae yna ddadl i ddweud bod rhaid cydgrynhoi'r holl beth, ond mae'n bwysig i ddeall y gwahaniaeth rhwng ailddatgan—*restatement*—a chydgrynhoi—*consolidation.* Beth rŷm ni'n trio ei wneud yn gyffredinol yw ailddatgan fel ein bod ni'n cael yr holl system—neu gymaint o'r system ag y gallwn ni yn ymarferol—mewn un lle, ac rwy'n credu ein bod ni wedi gwneud hynny yn dda.

Mr Hughes: It doesn't always happen. There are examples where it simply wouldn't have been practicable. The planning Bill is a good example of a Bill which, I think in its entirety, amends legislation that is already in existence, but the Law Commission is considering a project, and therefore there is an intention ultimately to consolidate planning legislation. If it were possible, that would be something that we would have to consider, but it wouldn't have been practicable to do that. The current legislation is so broad in certain circumstances for that to be more or less impossible. Education is a good example. There are some 22 parliamentary Acts relating to education, I think there are four Measures, and three or four Acts of the Assembly. Therefore, in those situations, you do have to question what point there is in restating certain things. There is an argument that you should consolidate the whole thing, but it's important to understand the difference between restatement and consolidation. Generally speaking, what we're trying to do is to restate, so that we get the whole system—or as much of the system as we can in practice—in one place, and I think we've done that well.

[141] **Simon Thomas:** Rŷch chi wedi'i ddisgrifio fe fel stori: oni bai eich bod chi'n ailddatgan cychwyn y stori, mae ail hanner y stori ar goll, onid yw e?

Simon Thomas: You described it as a story: unless you restate the start of the story, the second half of the story is missing, isn't it?

[142] **Mr Hughes:** Mae hynny'n ffordd dda o edrych arno fe. Er enghraifft, rwy'n credu, yn ein tystiolaeth ni, gwnaethom ni sôn am y Bil trawsblannu. Byddai fe wedi bod yn haws i ddiwygio'r Human Tissue Act 2004. Roedd e'n creu problemau technegol, gwneud beth a wnaethom ni, ond roeddwn i'n teimlo ei bod e'n bwysig iawn ein bod ni'n tynnu'r system a oedd yn ymwneud â chydsyniad i roi organau allan o'r Ddeddf. Roedd Deddf 2004 yn ymwneud â chydsyniad ar gyfer 15 gwahanol bwrpas, ac roedd yna lot fawr o bethau eraill ynddi, ond gwnaethom ni lwyddo, rwy'n credu, i dynnu hynny allan, a sicrhau ei fod yn ddwyieithog, ac rŷm ni wedi gwneud hynny mewn sawl sefyllfa. Rwy'n credu dim ond dwy neu dair esiampl sydd lle'r ŷm ni heb lwyddo i wneud hynny.

Mr Hughes: That's a good way of looking at it. For example, I think that, in our evidence, we referred to the human transplantation Bill. It would have been easier to amend the Human Tissue Act 2004. The approach that we took led to technical problems, but I thought that it was very important that we should take the system in terms of consent to organ donation out of the Act. The 2004 Act related to consent for 15 different purposes, and there were a number of other things included in it, but I do think that we succeeded in taking that out, and in ensuring that it was bilingual, and we've done that in several circumstances. I think there are only two or three examples where we haven't succeeded in doing that.

[143] Un sefyllfa lle gwnaethom ni eithaf lot o gydgrynhoi oedd y Bil tai symudol. Yn y sefyllfa yna, roedd gyda ni ddewis. Eto, wrth gwrs, byddai yna fodd wedi bod i ddiwygio'r ddeddfwriaeth a oedd yn gymwys i Gymru a Lloegr, ond roedd hi mor gymhleth fel yr oedd hi, petaem ni wedi dod i mewn wedyn â mwy o ddiwygiadau a oedd jest yn ymwneud â Chymru, byddai hi wedi bod yn anodd iawn i ddeall. Ond, y broblem o wneud hynny oedd nad oedd lot o amser. Roedd y Pwyllgor Busnes wedi caniatáu hyn a hyn o amser, ond cymeron ni'r penderfyniad, er y byddai hi wedi bod yn haws, ac roedd e'n risg—ac roedd yna rai gwallau, fel ŷch chi siŵr o fod yn gwybod—

One situation where we did a fair bit of consolidation was the mobile homes Bill. In that case, we had a choice. Again, of course, there would have been a way of amending the legislation that applied to England and Wales, but it was already so complex that, if we had then come in with even further amendments relating only to Wales, it would have been exceptionally difficult to understand. But the problem in doing that was that there wasn't a great deal of time available to us. The Business Committee had allowed so much time, but we did take the decision, although it would've been easier, and although it was a risk—and there were some errors, as I'm sure you are aware—

[144] **Simon Thomas:** O ran terminoleg, oherwydd y system.

Simon Thomas: In terms of terminology, due to the system.

[145] **Mr Hughes:** Ond, i roi hynny i mewn i gyd-destun, gwnaethom ni lot fawr i gydgrynhoi'r gyfraith mewn cyfnod byr iawn, ac o beth rwy'n ei ddeall gan swyddogion polisi yn Whitehall, roedden nhw'n genfigennus, braidd, ein bod ni wedi llwyddo i wneud beth wnaethom ni.

Mr Hughes: But, to put that into context, we did a great deal to consolidate the law in a very short space of time, and from what I understand from policy officials in Whitehall, they were rather envious that we'd managed to achieve what we did achieve.

[146] **Simon Thomas:** Ble ŷch chi'n gweld y cam nesaf yn y broses yma, felly, ar gyfer y

Simon Thomas: Where do you see the next step in this process, therefore, for the next

Cynulliad nesaf nawr, yn enwedig o gwmpas cydgrynhoi? A ydy hynny'n mynd i ddigwydd, fel ŷch chi newydd ei ddisgrifio, yn ystod y broses o ddeddfu dros Gymru, neu a ydych chi'n gweld Comisiwn y Gyfraith a'r posibiliadau newydd sy'n agor gyda Deddf Cymru newydd i gael mwy o berthynas rhwng y Gweinidogion a Chomisiwn y Gyfraith? A ydych chi'n gweld bod mwy o symudiad tuag at gydgrynhoi ar ei ben ei hunan, yn hytrach na'r hyn sy'n digwydd yn sgil deddfu ar faterion amrywiol?

Assembly now, particularly around consolidation? Is that going to happen, as you've just described, as a part of the process of legislating for Wales, or do you see the Law Commission and the new possibilities that will open up with a new Wales Bill to have more of a relationship between Ministers and the Law Commission? Do you see more of a move towards consolidation in its own right, rather than, as is currently the case, happening in the wake of legislating on various issues?

[147] **Mr Hughes:** Mae yna gyfyngiadau ar beth y gallwn ni ei wneud drwy ailddatgan. Felly, yn y pen draw, os ein bwriad ni yw creu system o ddeddfau Cymreig, mae angen mwy nag ailddatgan. Rwy'n credu y byddai pawb yn gytûn bod cydgrynhoi yn beth da. Beth sy'n fy mhoeni fi yw maint y dasg: mae'n enfawr.

Mr Hughes: There are limitations to what we can do through restatement. So, ultimately, if our aim is to create a system of Welsh laws, then we need to do more than simply restate. I think everyone would agree that consolidation is a good thing. What concerns me is the scale of the challenge: it's huge.

[148] **Simon Thomas:** Bydd eisiau mwy o swyddfa arnoch chi.

Simon Thomas: You will need more of an office.

[149] **Mr Hughes:** Wel, byddai eisiau teirgwaith y swyddfa. Nid problem Gymreig yw cydgrynhoi. Nid yw'n cael ei wneud rhyw lawer ar lefel Brydeinig. Mae yna lot o adnoddau yn gorfod cael eu rhoi i mewn iddo fe. Mae yna broblemau. Mae'n ymddangos efallai ei fod yn beth hawdd ei wneud, ond nid yw e ddim: mae yna faterion hawliau dynol sydd yn codi, felly mae yna ddeddfwriaeth sydd wedi cael ei phasio cyn y Ddeddf hawliau dynol, ac mae'n rhaid ystyried wedyn sut mae hynny'n gweithio yn y gyfundrefn newydd. Mae yna gymhlethdodau o ran gweithio allan pethau trawsffiniol. Felly, yn aml, byddem ni'n gorfod gweithio gyda Llywodraeth Prydain i allu gwneud popeth yn iawn, ac mae yna jest bethau ymarferol hefyd, fel deall hen ddeddfwriaeth. Os ydym ni'n bod yn hollol onest, yn aml, mae'n anodd ei deall. Mae Deddf Llywodraeth Leol 1972, er enghraifft, yn anodd iawn ei deall yn aml. Felly, mae yna lot o broblemau, ac nid yw e'n hawdd ei wneud. Y cwestiwn mawr i fi yw a yw e'n werth ei wneud ac a yw'n werth rhoi'r adnoddau i mewn i'r peth, a dyna beth rŷm ni wedi gofyn i Gomisiwn y Gyfraith ei wneud.

Mr Hughes: Well, we'd need an office three times the size. Consolidation is not a Welsh problem. It's not done a great deal at a UK level. It's very resource intensive. There are problems. It appears as though it's a simple task, but it isn't: there are human rights issues that arise, so there is legislation that was passed prior to the human rights Act, and that has to be taken into consideration, as to how that'll work within the new system. There are complexities in terms of working out cross-border issues. So, very often, we would have to work with the UK Government to ensure that everything is done correctly, and there are just other practical issues, too, such as understanding old legislation. If we are perfectly honest, very often, it's extremely difficult to understand. The Local Government Act 1972, for example, is often very difficult to understand. Therefore, there are lots of problems, and it isn't an easy task. The major question for me is whether it is worth doing and whether it is worth investing resources into it, and that's what we've asked the Law Commission to do.

[150] Un peth efallai y dylwn i ei ddweud: nid yw Comisiwn y Gyfraith o anghenraid yn

One thing that I should say, perhaps, is that the Law Commission isn't necessarily going

ateb i'r broblem yma, achos nid yw'n gwneud lot o gydgrynhoi bellach ei hunain. Rwy'n credu ei bod hi'n rhai blynyddoedd ers iddyn nhw gael project cydgrynhoi ar lefel Brydeinig, heb sôn am un Gymreig. Felly, os ydym ni'n mynd i wneud hyn, rwy'n amau ein bod ni'n mynd i orfod ei wneud e ein hunain, ac mae cwestiwn wedyn i ba raddau y mae'n werth chweil.

to provide a solution to this problem, because they don't do a great deal of consolidation themselves. I think it's been a few years since they've had a consolidation project at a UK level, never mind at a Welsh level. Therefore, if we are going to do this, I suspect that we're going to have to do it ourselves, and then it is a question of the extent to which it is worthwhile doing it.

[151] **Simon Thomas:** A ydy e'n mynd i fod yn fwy gwerthfawr os—neu, yn fy marn i, pan—fyddwn ni'n symud tuag at awdurdodaeth gyfreithiol ar wahân i Gymru?

Simon Thomas: Will it become more valuable if—or, in my opinion, when—we move towards a separate legal jurisdiction for Wales?

[152] **Mr Hughes:** Mae'n rhan o'r cwestiwn, onid yw e? Wrth i'r Cynulliad ddeddfu mwy, mae'r ddadl dros awdurdodaeth ar wahân yn cynyddu—heb fynd yn wleidyddol.

Mr Hughes: That's part of the question, isn't it? The more the Assembly legislates, the stronger the argument for a separate jurisdiction—without getting political.

[153] **Simon Thomas:** Mae'n olréit. Mae'r Prif Weinidog wedi dweud hynny ei hunan, a'r Cwnsler Cyffredinol.

Simon Thomas: It's okay. The First Minister has made that point himself, as has the Counsel General.

[154] **Mr Hughes:** Mae'n rhan o'r cwestiwn, ydy. Mae siŵr o fod yn rhywbeth bydd yn rhaid ei ystyried o ran adnoddau.

Mr Hughes: It's part of the question, yes. It is something that we will probably have to consider from a resource point of view.

[155] **David Melding:** Did you want to dive in under the fence, Suzy?

[156] **Suzy Davies:** Only a very short one, thank you, Chair. We've had evidence from Ministers in the past that, in deciding what goes on the face of the Bill and what goes into secondary legislation, they balance the need for scrutiny with effective use of Assembly time. I can see in your evidence there's a similar balance required in deciding whether you use the affirmative, the negative or no procedure when it comes to secondary legislation. How much weight do you put on the effective use of Assembly time—or, what do you call it here, the 'consumption' of Assembly time—in that decision?

[157] **Mr Hughes:** It's relevant. You will no doubt tell me that it's not a matter for us to decide how you spend your time, and that's fair enough.

[158] **Suzy Davies:** I'm not asking your opinion. What weight do you put on it?

[159] **Mr Hughes:** That's fair enough, isn't it? It's for the Assembly to decide how it spends its time. That's a natural response to what a Minister may say on that point. But that can be an element of it, purely because we know of the practicalities of what would be to come. I mentioned earlier how our lives are all planned and how we have spreadsheets that are looking at everything from week to week over the period of the Assembly. Part of that is knowing how much time is needed for the Assembly to consider Bills and to consider the subordinate legislation that follows. So, it's relevant in that context, but it's just one aspect of it. Another aspect of it is managing the Government's time. If we were to produce an enormous Bill, where we put everything in—. Let's say, for the sake of argument, you've decided not to have the kind of system I was referring to earlier, where you have the tier of primary, secondary, et cetera. Let's say you decided, 'Right, we're going to put everything on

the face of the Bill', then it would be very difficult for us to manage that process, because by separating out the process of producing primary legislation, subordinate legislation and guidance, et cetera, you're also separating out the time that you have to do that over. So, it'd be very difficult for Bill teams to, say, for example, produce an 800-page social services Bill. So, there are a number of aspects to this.

[160] Also, there's the question of how—. We've spoken earlier about access to legislation and we've spoken about how easy it is to find subordinate legislation, to find codes of practice or guidance, et cetera. Well, there's another question of how easy it is to find a provision within an 800-page Act of the Assembly. There are a number of nuances to this, and it's quite a complex question.

[161] **Suzy Davies:** It varies, is what you are saying.

[162] **Mr Hughes:** Yes.

[163] **Suzy Davies:** Thank you.

[164] **David Melding:** It's interesting. You could smother the Assembly with detail, putting so much on the face of it, but consideration of the Assembly's time seems more nebulous a concept than matters of policy, or what principle ought to be on the face of the Bill. You know? So, there must be some fundamentals that you would never remove from the face of the Bill—I hope.

[165] **Mr Hughes:** Well, yes.

[166] **David Melding:** Okay. Well, we've had a long session. We've overrun, but I think it reflects the interest we've had in your responses this afternoon. So, thank you very much for your very considered and candid evidence. It's been a great help to us and I have no doubt will inform our report in due course. So, thank you very much to you and your whole team, Dylan.

[167] **Mr Hughes:** Thank you very much. Diolch yn fawr.

15:00

Tystiolaeth mewn perthynas â'r Ymchwiliad i Ddeddfu yn y Pedwerydd Cynulliad
Evidence in relation to the Inquiry into Making Laws in the Fourth Assembly

[168] **David Melding:** Our next item is further evidence in relation to our inquiry into making laws in the fourth Assembly. I'm delighted to welcome Ruth Fox, who's the director and head of research at the Hansard Society. I think Members will be aware that the Hansard Society has done some very interesting work in this area, particularly in terms of drafting and secondary legislation, and how the culture seems to have changed somewhat in the last generation or so. I think you caught some of that session, and I will now ask my colleagues to put a range of questions to you. Can I apologise that we are running a little late? This is a very absorbing subject, and I think the Hansard Society has already produced some very absorbing evidence, which we would now like to probe a bit further. I'll ask Alun Davies to start.

[169] **Alun Davies:** Thank you very much.

[170] **David Melding:** Oh, I beg your pardon. I should explain that these proceedings will be conducted in Welsh and English, and there's a translation on channel 1 of the headset

when Welsh is used. Sorry, Alun.

[171] **Alun Davies:** That's fine. Dr Fox, the Hansard Society issued a report, 'The Devil is in the Detail: Parliament and Delegated Legislation', which appeared to be, on the face of it, quite critical of the way that Parliament is moving, if you like, in an incremental way, possibly, to using more and more delegated legislation. And I think that the point that you make in that report is that it's drifting to areas of principle, not simply technical regulation. I was wondering if you could perhaps give us some background on, not simply why you see that happening—that's self-evidently the case—but what the dangers you perceive associated with that are to be.

[172] **Dr Fox:** Well, the first danger is that—building on the discussion you had earlier with your previous team giving evidence—it starts to set a precedent, and you get a build-up of repeat activity, if you like: when you see one example of the drift, then that sets a precedent that can be used elsewhere. And you've reached a stage, I think, now where, in terms of Westminster legislation, you can almost find a precedent for anything you want in respect of secondary legislation, because there are so many sort of convergences.

[173] The second problem is that you have then a ratchet up effect in terms of the way in which parliamentarians want to scrutinise it. So, the more and more that Government is seeking broad, enabling powers, and that it's drifting away from issues of detail, Parliament—particularly the House of Lords—is focusing very much on trying to constrain that through scrutiny procedures. And it's having a ratchet up effect, to the extent that you now have 18 different forms of scrutiny procedure for delegated powers, at the point at which they become statutory instruments and when they take effect; 11 of those are enhanced procedures, and some of them are superaffirmatives.

[174] What you've got is this sort of cultural problem within Government departments, where there isn't a culture, or a circle, of learning in Whitehall, there isn't enough engagement with Westminster in terms of keeping up to date with what committee thinking is. That, primarily, is through parliamentary counsel, but it's certainly not through Government lawyers, it's not through Ministers. And then what you see, once the drafts emerge, and the powers are quite broad, into areas that, for example, the House of Lords Delegated Powers and Regulatory Reform Committee would not normally wish to see, you get this ratchet up effect, through the horse-trading of the legislative process, which means that scrutiny procedures have become almost bartering chips in the process. The focus is increasingly on the procedure, rather than the power. And I think, culturally, that is a difficult area for us to be in, in terms of legislation.

[175] **Alun Davies:** And the Hansard Society isn't just describing this as a narrative—it actually believes this is a bad thing.

[176] **Dr Fox:** Yes, I think it is. I mean, there will be always circumstances—legislation is an art, not a science—where you need a degree of flexibility, or you need greater powers than might otherwise be advisable, to meet your particular policy objective, or to meet particular circumstances of emergency, and so on; the banking crisis, for example, and what happened there in terms of financial legislation. But, as a norm, in terms of the drift that we're seeing in terms of the way in which the culture of delegated powers and delegated legislation are happening, I think it is now beyond the realm of acceptability, and beyond, I think, what parliamentarians themselves want in terms of what's democratically appropriate. If the public understood some of this, in terms of some of the powers that are going through with a lack of scrutiny and then emerging through statutory instruments with a lack of scrutiny, I think the public would not be particularly impressed with that, either. But then, there's a wider problem about capacity, time and engagement to look at that.

[177] **Alun Davies:** Okay, thank you for that. You said that parliamentarians themselves are concerned about this matter; could you, perhaps, point to a piece of legislation where a parliamentary committee of some description—wherever it happens to be: in the Lords, Commons, or wherever—has actually made that point very clearly and made the point that the Hansard Society is making?

[178] **Dr Fox:** The House of Lords delegated powers committee makes it on a regular basis in respect of a significant number of Bills. So, they will look at all the powers set out in Bills, look at each one and judge whether they think it's appropriate. They will compare it to past precedents and advise whether procedures should be uprated from the negative to affirmative procedure or from the affirmative to the superaffirmative procedure, and sometimes the Government will take that on board, but not always. So, you certainly see it there.

[179] In terms of political engagement with this area, there is a lot more activity in the House of Lords than in the House of Commons; that's certainly true. The appetite for this kind of technical detail is much more in the Lords. Frankly, they have more time. They don't have constituency commitments, so they engage with it a lot more. But, you can certainly see it. We have six case study Bills in here, going back over the last two Parliaments, and you can certainly see examples where committees have raised concerns on a frequent and regular basis. Our worry is why is it that, for example, in respect of the very broad powers set out in the Legislative and Regulatory Reform Act 2006, some years ago now, the Government comes forward with things like the powers in the Public Bodies Bill and then why did they come forward with similar powers in the Draft Deregulation Bill, all of which, on the basis of what had happened earlier, would lead you to the assumption that the House of Lords was never going to accept those provisions. So, it raises the question: what's the thinking in Whitehall that leads to a situation where those provisions are included from the outset?

[180] **Alun Davies:** I think there are some issues there that we would find quite familiar here. But, talking about the regulatory reform Act, is it not the case that, on occasions, that sort of legislation actually does quite a lot of good, because it cleans up the statute book, in some ways? I can think of areas of Welsh law where that Act was used in order to facilitate the clearing up of legislation that had fallen, not into disrepute, but had fallen into disuse, and there were a number of occasions where that was quite a useful way of providing a clearer statute book without necessarily creating an enormous beast of either a Bill or of using parliamentary time in a way that was probably unproductive.

[181] **Dr Fox:** The principal objective of the Bill may not be wrong. We'd have no issue with what underpins the policy objective; our concern is primarily around the process. So, for the Legislative and Regulatory Reform Act, whether it's appropriate for Ministers to have provision for reforming legislation without any hedging in of that wording, and, for example, the amount of parliamentary time that was given over to deciding some new procedures to effectively hedge in these powers and create legislative reform Orders. Now, post-legislative scrutiny of those demonstrates that they take anything between 11 and 18 months to come to fruition, at which point you think—. Well, the Government itself has concluded that they're not an effective use of time and are using something like 30% less than they had originally intended. So, whilst the objective and the policy might be positive and working in the right direction, the procedure that's been pursued really hasn't helped them, in many respects.

[182] Similarly, with the Draft Deregulation Bill, the principle of deregulation may be entirely right and it may be necessary to undertake that work, but whether it was appropriate to do it through that mechanism when there were other mechanisms available, particularly when statutory instruments are subject to judicial review and primary legislation isn't, goes to the heart of the question that concerns us.

[183] **Alun Davies:** You've said in your report as well that you have concerns about the

ambiguous and broad wording used in primary legislation, which then provides for powers further down the road that might be used for purposes that would not necessarily have been either scrutinised or foreseen at the time that primary legislation was being scrutinised. Could you give us examples of what you mean by that? You mentioned the regulatory reform Act, but do you have any other examples?

[184] **Dr Fox:** Yes. A topical example would be the legislation for tobacco packaging. Last year, the Government announced that it was making provision within a Bill that was going through—the Children and Families Bill I think it was—Parliament at that time. It was making provision for taking powers that it might use in the future, but it hadn't made a policy decision about whether it wished to do so. There were also provisions in, I think, the banking Bill to disapply or modify the effects of any provision in respect of the special resolution regime that was being introduced after the banking crisis. Again, it was very broad in terms of how it might be interpreted. There were powers in that same Bill for retrospective effect, which is a worrying sort of development in terms of where that might lead in respect of legislation. So, there are those examples and then I've mentioned the draft deregulation Bill, which gave the power initially in the draft, although this was removed as a result of pre-legislative scrutiny, to repeal legislation no longer of practical use. There was no particular definition of what 'no longer of practical use' would be, other than whatever the Minister of the moment might decide it to be. So, it's that kind of very broad wording without it being hedged in and without the appropriate procedures to manage that.

[185] **Alun Davies:** Okay, that's great, and I'm grateful to you for that. Finally from me, you've outlined these things that you see as very negative and which are poor examples of how parliamentary process is developing and the rest of it, so perhaps you could outline to us how you would like to see the parliamentary process operate. Do you have an example of a very good Bill, for example, passed recently—obviously not by this present Government but perhaps from another perspective? [*Laughter.*]

[186] **David Melding:** By Labour. [*Laughter.*]

[187] **Alun Davies:** A Labour Government. [*Laughter.*]

[188] **Dr Fox:** Our core recommendation in the report is that there should be a wholesale legislative inquiry into the way primary and secondary legislation work, because, in our view, at the Westminster end, in terms of the nature of the procedures—the complexity of them—there is now a danger in term of patchwork reform of them that you create new problems. Actually, we've reached a situation where I think we need to ask very fundamental questions about the way we legislate, both for primary and secondary, and whether or not there are ways to do it better in light of the type of legislation, volume and the technicality that is coming through. For example, we would want a rationalisation of procedures—18 procedures is just ridiculous—and the ratchet effect means that parliamentary committees are suggesting new ones and it will just add to the problem.

[189] We would certainly want to see greater interaction between Whitehall and Westminster about the way in which Bills are brought forward. We've advocated for a legislative standards committee at the outset so that, at the point at which the Government has decided at Cabinet committee level that the Bill is ready, it has to go there first for checking by either the House of Commons committee or, ideally, a joint committee of both houses as to whether or not certain sorts of technical and procedural aspects of the Bill are indeed ready from Parliament's perspective. At the moment, the Bill arrives from Whitehall and Parliament has to scrutinise it when it's set by the Government business managers in whatever form it appears, and there isn't the push-back on Whitehall to ensure that some of the procedural and technical aspects of the Bill are improved, despite the fact that parliamentarians regularly complain about the process.

15:15

[190] Now, there, of course, is no appetite for that from the Government. I don't expect that to change any time soon. It has the support of a number of parliamentary committees, both in the Commons and the Lords but there's been no progress on that. I think that would be one way because the pushback that you need in terms of preparation and production of the legislation isn't happening in Whitehall. So, what we're saying is that you need something at the gateway point to Westminster in the parliamentary system.

[191] I think that the issue of time management is critical. It's about how Government manages its time—the parliamentary time available—and then what the capacity of the Parliament is—of Members—to scrutinise what emerges. Certainly, from our perspective, we'd say, 'Well, why do we need any longer a legislative scrutiny system that adopts exactly the same process for each and every Bill?', so that the most controversial aspects, or the biggest and most controversial Bills, get exactly the same process as a small anodyne Bill that attracts very little controversy. There are significant swathes of Westminster legislation that are going through without any scrutiny really at all. This concept of line-by-line scrutiny, you know, is just not happening for significant elements of particular Bills because time runs out in the Commons, more so as there's more scrutiny in the Lords. But then why not have a more flexible approach in which a parliamentary committee, whether it is a legislative standards committee or something else, works with Government to decide that it will take a slightly different route through the legislative scrutiny process to ensure that the bits that parliamentarians want to focus their scrutiny on get the attention they need, and that they want them to have, and the more anodyne stuff goes through a slightly different route? We'd also say that if Government persists in wanting to bring forward late amendments—you know, if at Report Stage, for example, at Westminster, a certain point is reached—it should have to recommit the Bill to a committee to enable Members to properly scrutinise it.

[192] **Alun Davies:** It would be interesting, of course, to know who decides what is an anodyne Bill and what isn't. But, is there a case, Dr Fox—. I don't disagree with your criticisms, as it happens; I think that they are largely right. But I remember these criticisms being made of Kenneth Baker, I think, introducing the Education Reform Act in 1987. Is it a case of 'twas ever thus, and that each generation of parliamentarians and parliamentary commentators discovers the perhaps ugly reality of law making for a first time?

[193] **Dr Fox:** Yes, I think there is an element of that. To the point about what is anodyne, that is a matter of policy and politics. That is a matter for Members. I think that what we're saying is that you provide a forum in which Members can make that decision, rather than just having a system in which everything is funnelled through the same process regardless of what Members think.

[194] Perhaps 'twas ever thus, but it's also true that a Member of the House who is sitting on the opposition benches or the back benches, scrutinising legislation, will have all sorts of principled objections and concerns to a particular Bill, to a particular procedure, to the way in which it is dealt with, but give them a ministerial red box and an office in Whitehall, and when they bring forward a Bill they've had a Damascene conversion and those concerns are not as relevant, which goes to the point about it being—. It's not a science, and there's a lot of subjective elements to the process. The problem in many respects, with regard to the balance between primary and secondary, is that your view of it depends upon where you sit in the process, and therefore where you sit in the process determines what you think is important. The parliamentarian scrutinising it thinks that there are certain elements that are more important than the Minister, and you get a situation where Ministers can't imagine why a backbencher would think that these powers that they are taking would ever have been misused. But of course, that's exactly what an MP thinks.

[195] **David Melding:** Suzy Davies.

[196] **Suzy Davies:** Thank you. I just want to take you right back momentarily to this business of the drift. Would it be fair to say that a lot of that is down to incomplete policy consideration and that, actually, the whole process takes longer as a result of having more secondary legislation? Is that a fair observation, do you think?

[197] **Dr Fox:** Some of it is, I think. I think that there are a range of factors: we identified seven in the report. But, certainly, there are instances where the policy process is clearly not complete, even to the point where, at Westminster, Bills are going through and they've reached public Bill Committee Stage, they've perhaps had several scrutiny sessions and the public consultation process on those elements of the Bill—the housing elements of the Localism Bill, for example, a few years ago—has not yet been concluded and the report has not been provided as to what it is that the consultation found, which leads, obviously, people to question what's the point of the consultation and to have concerns about that element of the process. But, clearly, there, the policy process was not complete. On the tobacco advertising issue I referred to, the Government had taken the powers to legislate for tobacco packaging but hadn't made its mind up actually whether that was what it wanted to do. There are other examples that are slightly different in terms of policy formulation, in emergency situations, where they will take powers to deal with outcomes of court cases, for example. How to handle DNA samples following a European Court of Human Rights case was one example of where they weren't sure exactly what they were going to do in terms of responding to that outcome, so the policy wasn't entirely formed, but they knew that they needed to do something quickly, so it went into a Bill, at a point at which it couldn't effectively be scrutinised, because they hadn't fully confirmed how it was that they wanted that to operate.

[198] **Suzy Davies:** That's helpful, because I think even just within that one question of policy completion or consideration, there are different things to think about there. It's not all just about buying time

[199] **Dr Fox:** No.

[200] **Suzy Davies:** You mentioned earlier that you would like a sort of review of how this work is done anyway. Obviously, the system is different here. I'm guessing you've had a look at the Counsel General's guidance on what should be in primary and what should be in secondary legislation. Are you happy to share your view with us on that? Is it on the right lines?

[201] **Dr Fox:** It's on the right lines. I mean, it's not that dissimilar to what's in the Cabinet Office guidance to legislation, and, indeed, in the Office of the Parliamentary Counsel's guidance, which drive how Whitehall produces the legislation, but you still, obviously, see quite significant divergences from that, from time to time, in particular Bills. So, it's a useful development, I think.

[202] I think the question is—and it may be different here; I don't know enough about it—that in Whitehall, for example, although they have the guidance, very often one of the problems is that civil servants who are working on the Bill team—and possibly sometimes the Government departmental lawyer—won't have dealt with a Bill before. It will be the one and only time they'll be involved in producing a Bill. So, all they will actually have to guide them is that—that's what they will go to first and then it'll be a question of their interaction with their departmental lawyers and the Office of the Parliamentary Counsel. So, one of the problems we think at Whitehall is that the guidance is helpful to an extent, but also you need the guidance from parliamentary committees in terms of their attitudes, you need an understanding of past precedents and that field of legislation, and you don't have that when

there is such a turnover of civil service staff in their roles that means that a lot of them only serve on a Bill team once. So, there isn't a circle of learning that flows from it.

[203] **Suzy Davies:** That's interesting as well, because I was asking the question from the point of view, in a sense, that however cumbersome, at least Parliament's got 18 ways to challenge drafts that are based on guidelines, whereas we have far fewer here. But, you say that there's almost a problem at the supply end as well, because there's a churn of staff.

[204] **Dr Fox:** Yes.

[205] **Suzy Davies:** Oh, right. As a result of all this, have you noticed any sort of trend or, I don't know, issues that might actually at one point have been justifiably put into secondary legislation turning into guidance rather than secondary legislation? Is there a general trend of dumbing down on that? 'Dumbing down' are the wrong words, really.

[206] **Dr Fox:** That's not something we've particularly picked up in terms of our research, so I couldn't really say in terms of any—

[207] **Suzy Davies:** No, no. I was just flying a kite there. Then, just finally, I want to repeat a question I asked in the last session. On this idea of parliamentary time, and the effective use of it, is that an appropriate consideration in deciding what goes on the face of the Bill or not, and also the relevant procedures for dealing with secondary legislation?

[208] **Dr Fox:** I don't think it should be the primary driver, but I equally don't think you can ignore it either, for some of the reasons that the people giving evidence talked about. It's all very well saying, 'We take time out of the process', but, at the end of the day, either in terms of the Bill itself or the statutory instruments at the later stage, there has got to be time to scrutinise it properly, or else you're committing to a process that you can't resource and you can't do properly, which would lead you to a situation that is no better.

[209] In terms of time, though, certainly in terms of Westminster, a lot of this comes at the parliamentary and legislation committee, Cabinet committee, stage, where, ultimately, it's actually not, from their perspective, about parliamentary time—sorry, parliamentarians' time—so much as how they're going to manage simply time on the floor, and the number of committees they need at any one time. From their perspective, time may be an issue of, you know, there are two departments at loggerheads with one another, they can't decide on a policy, they haven't made a decision, drawing a line in the sand, and saying, 'We're going with this', is sometimes a way of getting them to come to a conclusion, and forcing the issue. So, you see that sometimes, that they will push ahead, and perhaps, ideally, it's not ready from a policy perspective, but, time wise, they want to get on with it, there's a gap in the parliamentary programme, so they will move.

[210] Again, you know, the focus at the Whitehall end is not on what's appropriate, but it's on delivery. If they've got a gap in the parliamentary legislative programme, and this Bill is planned for that, they're going to go with it. I suppose it's a bit like writing a book: you can keep at it, and you can keep refining forever and a day—you know, there are a hundred different ways I could think of improving the text—but there comes a point at which you have to stop, and it has to go forward. Now, the balance, therefore, is whether or not, having reached that point in terms of technical standards, for example, that Whitehall has done enough in terms of the preparation of the Bill to have it ready, from Parliament's perspective, in terms of what you want to see—the explanatory information, a clear delegated powers memorandum and whether it provides proper assessment of financial implications, and so on. You know, are the technical elements there? One of the concerns at Westminster is that, sometimes, they're not.

[211] **Suzy Davies:** Okay. Thank you very much.

[212] **David Melding:** Simon.

[213] **Simon Thomas:** Thank you. The Welsh were very keen on the Tudors, because it was seen as the restoration of the throne of Britain, and a great Welsh myth being made flesh. We're not so keen these days on the Henry VIII powers, and you've got a lot to say about those in your evidence, and the work that the Hansard Society has done. Could you just comment further on the nature that you've described, and the change of relationship around Parliament and these powers, which has gone from one of criticising the use at all of these powers, to one where it's looking at reforming, as you put it, the use of these powers? How exactly is that working through, because these are powers to amend primary legislation, and you would have thought they really should be in Parliament's hands, never in a Minister's hands—or, at least, only in extremis in a Minister's hands?

[214] **Dr Fox:** Yes, although the scope and impact of a Henry VIII power can vary quite considerably, so it can be something that could abolish—as we had with the Public Bodies Bill—a public body that had been set up in primary legislation, which parliamentarians would want to look at, alternatively it could be just changing a name of something. So, does Parliament want to spend time looking at that again, or not? Those are, if you like, the two poles. Just because something is a Henry VIII power, it doesn't mean that it's automatically wrong; it's a question of what's at stake and impact. Where you have seen, I think, a trend is where you have these broad powers that do give Ministers—I referred to earlier—quite significant potential power for action if they wanted to take it. Where we've ended up in terms of how Westminster treats it, it is that ratchet-up effect, where, rather than insisting on the clause being removed, there has been a sort of bartering effect, where a scrutiny procedure is introduced—whether that's a legislative reform Order or a public body Order or whatever—which is intended to try and constrain it.

15:30

[215] That's where you get the development of the 11 enhanced affirmative measures. One of the issues with those is that some have got consultation, some go into committees, one's got a veto, and you get varying different types of approach. You come down to the central question: if the power is inappropriate and you think it shouldn't be there, then what difference is consultation and a committee looking at it over an extended period of time going to make? I think that's where Westminster now has the difficulty. It's got all of these procedures, and that's where the focus is, rather than whether or not the power should be removed.

[216] **Simon Thomas:** Those procedures don't necessarily guarantee—one or two of them do, as you've outlined—time to look at the exercise of the power at all. It can be a procedure that goes through almost on the nod. Or, at least, they go through a subordinate legislative committee. They certainly won't get the scrutiny of most parliamentarians on it.

[217] **Dr Fox:** The majority of parliamentarians won't look at it, but the level of scrutiny that would be applied by, for example, a delegated powers committee to it would be quite substantial. The problem is: will they object to it? It's all very well having the power to look at it and to discuss it, but are they prepared and do they have the power to reject it? Now, there is a power of veto for a legislative reform Order. That's one of the reasons why the Government is reluctant to take as many through of those as anticipated, because of that power of veto and the risk. But, in terms of the other procedures, all the discussion in the world won't necessarily solve the problem, unless Members are prepared to reject. The number of SIs that are rejected is very small.

[218] **Simon Thomas:** Yes, one or two here. But, very few are called in—just saying in passing. I was struck by what you said earlier, which is relevant to this debate, around bargaining chips around different procedures to be used. It does strike me that this happens here as well, that when Members contest powers given to Ministers in a Bill, Ministers like to feed a little bit of extra corn and say, 'Well, you can have a superaffirmative then, and that makes it okay'. But, that doesn't deal with, as you just said, the actual principles at stake. Clearly, you see that happening in Westminster as well. Where has that led the Westminster process now? Obviously, it's led to this plethora of different motions and procedures and ways of doing things. Have the principles been completely lost in that debate in Westminster?

[219] **Dr Fox:** I think, to some extent, they have. The first parliamentary counsel gave evidence to the Political and Constitutional Reform Committee's inquiry into legislative process, just over a year ago, and admitted that he wasn't entirely sure there was a consensus anymore around the principles. I think that is increasingly emerging as an accepted view. In terms of where we've arrived at, one of the problems is that Members themselves, particularly in the House of Commons, particularly Ministers, don't engage enough with this element of the process in terms of legislation.

[220] **Simon Thomas:** Are you talking about secondary legislation in general, or—

[221] **Dr Fox:** Delegated powers within Bills, and then secondary legislation. Consequently, I don't think that there is a view within Government about the problems, more out of ignorance than anything else, because they don't tend to engage with the detail of it. For example, when they're offering new scrutiny procedures, there isn't an awareness among some Ministers that there are similar procedures elsewhere. We saw that with the draft deregulation Bill when Ken Clarke seemed completely ignorant of the fact that there were other procedures, which were similar to what was being proposed in other Bills. That is one of the difficulties.

[222] **Simon Thomas:** Where do you suggest the way forward is, therefore, in trying to perhaps simplify these procedures but also strengthen them, and perhaps get them back to some first principles there? Have you been able to make a set of recommendations from that, or have you analysed and given up in despair?

[223] **Dr Fox:** We thought about that. There are quite a number of reforms in here that we suggest, but, ultimately, we think that they will ameliorate, but not really resolve the difficulties. And that's why we think a major inquiry modelled on the Renton committee inquiry that took place at the end of the 1970s is needed. Because, I think, there needs to be a debate about where that line is now between principle and detail, what it is that Members want to look at, and how it is that lawyers within Government departments' Bill teams, Ministers and parliamentarians can interact and develop a better circle of learning. Because of committee inquiries like the Political and Constitutional Reform Committee's inquiry and this one, I think there's possibly more interaction and engagement around these issues than there has been previously. But still, we did get the sense when we were doing our research that, before, they were vaguely aware of problems but they were talking past each other, when, in fact, they ought to be talking to each other in terms of Whitehall and Westminster to try and resolve some of these things, but they don't interact.

[224] **Simon Thomas:** We've had a couple of Bills come before us here that have been described by the Ministers themselves as framework Bills; in fact, there was one called a skeleton framework Bill, which is fascinating to think about. Clearly, within a framework Bill, there are very general principles on the face of the Bill, but all the application of the Bill is, in effect, left to secondary legislation, including some important potential human rights implications of that, with individuals' businesses and what might come from that. Is that something that's been observed in Westminster as well—that tendency to produce a

framework Bill and say that a lot of the detail will come later? I don't know who's following whom, but is that a general trend in western democracy because of the complexity of this issue, and can that be addressed by such an inquiry that you've talked about? Is that what you think can definitely get to the nub of it?

[225] **Dr Fox:** Yes. To give you an example—it's in one of the case studies—welfare reform traditionally tends to be more framework because of the technical detail, and you want that off the face of the Bill. That may well be sensible. But, regarding the welfare reform Bill, for example, even during the debate itself, both Ministers and backbenchers scrutinising the Bill would refer to it as, you know, setting out the bookcase, and then there's a question of where does your bookshelf go, and then where does the book go on the bookshelf. From the perspective of Members scrutinising that Bill, they thought that they had got the bookcase, but they had no idea where the Government wanted to place the bookshelf, let alone the books. I think, to some extent, the issue is the bookshelf rather than the book. The book is the statutory instruments—the level of detail you want—but it's where should the focus be and where should the balance lie in terms of where you want to place the bookshelves in your legislation, if you follow from my drift. It can be a useful analogy, I think, in that you've got the two poles and then it's that middle element where I think there is a lack of agreement and consensus, and a discussion and a debate around that would be useful.

[226] So, for example, in that Bill, they were dealing with extremely important issues like universal credit and the whole reform of the welfare system. So, where in that context, looking back, would it have been better to have more detail on the face of the Bill? An inquiry could look at that and could engage with the participants in that process to try and learn the lessons.

[227] **Simon Thomas:** Diolch. **Simon Thomas:** Thank you.

[228] **David Melding:** Did you want to follow up something, Suzy?

[229] **Suzy Davies:** Yes, it's on your books and bookshelves problem. If more secondary legislation is dealing with bookshelves, does the actual whole process actually take longer than if more information was on the face of the Bill to start with—in very general terms, because I appreciate every Bill is different?

[230] **Dr Fox:** Yes, every Bill is different. It can do; if you end up in a situation where you have, for example, a Bill that leads to more enhanced affirmative procedures, they can take 11 to 18 months, so there's no time-saving for Government, which is—

[231] **Suzy Davies:** Or for Parliament, because, of course, that's the area in question.

[232] **Dr Fox:** —which is one of the advantages of delegated legislation. So, it would depend from case to case, but there certainly are some time problems with what's emerged in terms of procedures.

[233] **Suzy Davies:** Thank you.

[234] **David Melding:** On the face of it, one check against this move away from scrutiny, whether inadvertent or not, and over-reliance on statutory instruments—and we know that most are not called in and debated, let alone anything else— but would one added safeguard be just to say that certain statutory instruments could be amendable? What is the principle that they can't be amendable, for instance? I don't know when that was established.

[235] **Dr Fox:** Well, if you amend it, you go against the principle of delegation in the first place. The danger—

[236] **David Melding:** I understand that, but, you know, as a safeguard, maybe.

[237] **Dr Fox:** The danger of amendment is that, in practice, what could happen is that it would reopen the primary legislative debate. It's also the case that quite a number of statutory instruments will already be on the statute book and operational before the scrutiny process may be complete. So, you don't want amendment in those circumstances; you need a greater degree of certainty. So, we don't, in the report, support outright amendment; what we have suggested is that there should be a power of conditional amendment, which is that both Houses have the power to delay implementation of the instrument, but subject to them clarifying what it is about it that they would like to see changed, and to the Government coming back in response to that. So, we would build that in, rather than an outright power of amendment, because I think that could lead to some serious legal difficulties in some cases.

[238] **David Melding:** William Powell.

[239] **William Powell:** Thank you, Chair. Good afternoon. Could you give us your view, please, on the value of pre-legislative scrutiny, including the publication of draft Bills, which, on occasion, have been quite popular here in the Assembly?

[240] **Dr Fox:** We're a strong advocate of pre-legislative scrutiny. We recommended it about—I think it was 20 years ago, in our commission report 'Making the Law', and we twinned it, in the context of the Westminster system, with programming of legislation. The idea being that, if you were to have good, effective pre-legislative scrutiny that would deal with some of the contentious issues, improve the Bill at the point at which it comes forward, and then combine that with programming, it would act as a timesaver. The reality of what we've got is that we have programming but not the pre-legislative scrutiny to accompany it. So, programming applies to all Bills, but pre-legislative scrutiny applies only to a few Bills. Admittedly, this Government has produced more in recent years at pre-legislative stage than the previous Government. One example where I think it can make a difference is the draft deregulation Bill that I gave evidence on to a House of Lords committee, where there was in that particular Bill this power to repeal legislation no longer of practical use. There were two particular clauses in that that were very, very broad, and, through the process of that evidence to the committee, the Government removed those clauses. What they've produced is a quite considerably different Bill in response to the consultation and to the committee report, but it's having a smoother passage through Parliament than it would otherwise have had. So, there's a balance in terms of whether you ultimately save time, but I think it means that you can bring out some really important issues much earlier.

[241] **William Powell:** That's helpful, thank you. In your earlier remarks, you referred to an extreme delay in the publication of the consultation on the Localism Act, if I heard you well. What observations would you have, apart from timely feedback and publication of such consultation, in terms of improving public and stakeholder engagement in the legislative process?

[242] **Dr Fox:** Well, in terms of delegated legislation specifically first, engagement is extremely difficult, and this is one of the problems that emerged through our research in terms of consulting with outside bodies that are affected by this—they couldn't understand the process, they didn't know when statutory instruments were going to emerge, they didn't understand the procedures, the nomenclature was confusing, and they didn't know at what point they could get involved. The quality of consultations was very, very variable, and parliamentary committees have been critical of that, and the quality of the explanatory memorandums that come forward is also very variable.

[243] In terms of the wider legislative process, we think we have to be realistic that we're

never going to get significant numbers of members of the public coming forward to comment on legislation. It's going to be, generally speaking, particularly interested groups who are affected by a specific piece of legislation, and one of the issues is how they understand it in terms of the way we draft legislation, but I don't think there is a way around that, unless we tear up our approach and start again with a blank sheet of paper.

15:45

[244] Westminster is considering experimenting with different types of public engagement initiatives, so, it's trialled an online public reading stage to mixed effect, and there's now talk of introducing a new stage prior to Committee Stage that would enable the public to comment on legislation. It's not entirely clear at this stage how that would work, but, generally speaking, public engagement with the legislative process is quite low, and I don't think that's probably going to change any time soon.

[245] **William Powell:** There's a link between that question and the next I want to bring, which is around the usability of legislation, particularly in terms of the importance of clarity in drafting, consolidation and the explanatory material that's produced to accompany proposed legislation.

[246] **Dr Fox:** As I said, the issues around the explanatory material—there are some quite significant criticisms made of the variable quality of it from department to department. It varies from Bill to Bill, and the question is whether parliamentary committees are going to track that on a regular basis, and effectively publish almost league tables, if you like, in terms of quality. There are certainly moves to that, where they are naming and shaming departments for either late production of materials or inferior quality, or, in some instances, where they've sent it back and said, 'There are such significant problems with this explanatory material that we want you to look at it again'. That's one of the big areas that certainly Westminster struggles with.

[247] **William Powell:** Finally from me, what, in your view, is the value of post-legislative scrutiny in terms of learning for future legislation and its application?

[248] **Dr Fox:** In principle, the value should be considerable. I think in practice we don't actually know, because there hasn't been that much of it, and it's quite patchy in terms of what is looked at. So, on the Legislative and Regulatory Reform Act 2006, for example, there's been a recent look at that Act, at the end of the last year. You can take things from that report and look at—. That's where, for example, you learn how long the legislative reform Orders are taking, why the Government is no longer proceeding with as many of those as they expected, and, from that, you know, parliamentary committees should be able to take some learning from that and apply it in terms of how they look at other Bills. So, when Government doesn't want to come forward with other procedures, they should be pushing back in terms of saying, 'Well, you have these, but you're not using them, so we're not going to spend parliamentary time on this'. But it comes back to a central problem: the capacity of Members, in terms of their time, particularly at Westminster in terms of the House of Commons and, I would imagine, here in terms of Members with constituency commitments as well as all their legislative and scrutiny commitments—how is that to be managed?

[249] **William Powell:** Absolutely. Thank you very much.

[250] **David Melding:** Just a final question from me: the devolved institutions are still fairly new, and I wonder whether the society has picked up examples of good practice, and perhaps poor practice, in the devolved institutions. We'd be especially interested in anything you've spotted in our case, in the Welsh Assembly.

[251] **Dr Fox:** To be honest, we haven't done enough work on it to give that kind of assessment. I wouldn't feel comfortable commenting without that kind of detailed knowledge. The one thing—there's nothing new here that you've not already heard before—that has always struck me in terms of the Assembly is that there isn't obviously the capacity that leads to a backbench culture of a kind that you find in a bigger legislature. That has implications in terms of committee work and legislation. But you're aware of that, and there are recommendations from the Silk commission and elsewhere that that should be addressed. But that's always struck me as one of the issues that defines how Members engage with the work.

[252] **David Melding:** Thank you very much. I think that was very interesting evidence, and reflected some very pertinent thinking. The report also will inform our inquiry. So, thank you very much for taking the time to travel to Cardiff this afternoon and share your experience with us. So, thank you and have a safe journey back.

15:50

Offerynnau nad ydynt yn Cynnwys Materion i Gyflwyno Adroddiad arnynt o dan Reol Sefydlog 21.2 na 21.3
Instruments that Raise no Reporting Issues under Standing Order 21.2 or 21.3

[253] **David Melding:** Item 4: instruments that raise no reporting issues under our Standing Orders, but they are listed. Are we content? Or it is listed, sorry.

Offerynnau sy'n Cynnwys Materion i Gyflwyno Adroddiad arnynt i'r Cynulliad o dan Reol Sefydlog 21.2 neu 21.3
Instruments that Raise Issues to be Reported to the Assembly under Standing Order 21.2 or 21.3

[254] **David Melding:** Then item 5: instruments that do raise reporting issues. It's the Environmental Permitting (England and Wales) (Amendment) Regulations 2015. Steve, do you need to bring our attention to anything?

[255] **Mr Davies:** Yes, there are quite a number of points on this set of regulations. As the report sets out, these regulations transpose EU directive 2012/27 on energy efficiency. There are a number of points listed, both technical and merits points, and a Welsh Government response was received by us today. The first technical scrutiny point was the fact that they've not been made bilingually. They're composite regulations for Wales and England, and the Welsh Government has responded by saying that these regulations are subject, obviously, to the approval of the National Assembly for Wales and by Parliament and, accordingly, they don't consider it reasonably practicable for them to be laid bilingually. Unusually, these regulations have been laid with a number of known defective drafting errors. This has been listed in paragraph 10 of the explanatory memorandum provided by the Welsh Government. I'll come on to this in more detail when we come on to the merits scrutiny, but they include a number of incorrect cross-references and misspellings.

[256] Under the merits reporting points, the first point I'd like to raise is in relation to the EU deadline for transposition of this particular directive. It was in June 2014, so, therefore, these are over nine months late in being laid, therefore at risk of infraction proceedings. The reasons given by the Welsh Government are that there was protracted consultation and this resulted in late or delayed implementation.

[257] The final merits point I make reverts back to the technical point in relation to the drafting being defective and containing known errors. The errors were discovered when these composite regulations were laid in Parliament on 17 December last year. Usually, when errors

are spotted, they would withdraw the regulations and then re-lay them. Unfortunately, due to the up-and-coming prorogation of Parliament, it was thought that there was a danger then that, if they were withdrawn and then re-laid, there wouldn't be sufficient time for the debates to take place in Parliament. Therefore, the decision was taken to go ahead with the regulations, as laid, with the errors in them. They were also concerned, obviously, that it would cause further delay with the transposition of this directive as this is already being laid late—over nine months late—as things stand. Because they're composite regulations, the Welsh Government was not in a position whereby it could amend the regulations and lay them without the known errors because they had to be identical to those laid in Parliament. The Welsh Government have accepted that this is not really—well, it's not really acceptable practice, but they have pointed out that this was an exceptional situation, which was compounded by the prorogation of Parliament. They also state that this exceptional approach has been taken to avoid further delay in transposing the relevant EU legislation. Finally, they state they do not foresee that this situation will, and will take steps to ensure that this does not, arise again.

[258] So, that's the Environmental Permitting (England and Wales) (Amendment) Regulations 2015.

[259] **David Melding:** Any questions?

[260] **Simon Thomas:** A gaf i ofyn cwestiwn ynglŷn â'r diffygion sydd yn y rheoliadau, achos maen nhw'n eithaf sylweddol? Mae'n fwy na jest hepgor '*the*' a phethau felly. A oes modd gwella'r rheini wedi iddyn nhw gael eu cymeradwyo, felly? A yw hynny mewn trefn?

Simon Thomas: Can I ask a question on the deficiencies within the regulations, because they're quite significant? It's more than a matter of leaving out 'the' and such things. Could these be amended once they've been approved, then? Would that be in order?

[261] **Mr Davies:** Rwy'n meddwl, os mai camsillafu yw e—mae peth camsillafu yna—a hefyd mae yna—

Mr Davies: I think, if it is a misspelling—there is some misspelling there—and also there is—

[262] **Simon Thomas:** Mae cyfeiriad at y pethau anghywir, onid oes?

Simon Thomas: There is a reference to the wrong things, isn't there?

[263] **Mr Davies:** Maen nhw yn cyfeirio at bethau anghywir, ond maen nhw'n cyfeirio at bethau nad yw'n bodoli hefyd. Ni fyddai'n achosi rhyw broblem gyfreithiol, fel petai. Felly, am y rheswm yna, rwy'n credu ei fod yn bosib gwneud y newidiadau ar ôl iddyn nhw gael eu gosod. Nid yw'n dderbyniol iawn, nid wyf yn meddwl, ond mae e lan i chi fel pwyllgor beth rydych yn ei ddweud am hynny. Ond, byddai'n bosib gwneud y newidiadau.

Mr Davies: They do make incorrect references, but they do refer to things that don't exist as well. It wouldn't cause a legal problem, as it were. So, for that reason, it is possible to make the changes after they are laid. It's not particularly acceptable, I don't think, but it's up to you as a committee what you say about that. But it would be possible to make those changes.

[264] **David Melding:** Alun first, then Suzy.

[265] **Alun Davies:** Rwy'n credu bod yn rhaid inni ystyried bod y Llywodraeth wastad wedi dweud, petai yna unrhyw fath o Orchymyn sy'n ymwneud â Chymru a Lloegr, na fyddem yn gwneud hynny yn y

Alun Davies: I think that we have to consider that the Government has always said, if there was any kind of Order to do with an England-and-Wales issue, we wouldn't do that in Welsh. I'm not really sure that I believe the

Gymraeg. Nid wyf yn siŵr fy mod yn credu'r gosodiad. Nid wyf yn gwybod os mai dyma'r lle i wneud hyn, ond nid oes rheswm, oherwydd eu bod yn rhaid mynd gerbron y Senedd yn San Steffan, na allwn wneud hyn yn y ddwy iaith yn y fan hyn, hyd yn oed petai—. Gallai Aelodau Seneddol San Steffan hyd yn oed weld y Gymraeg. Felly, nid wyf yn derbyn hynny fel gosodiad a fel safbwynt gan y Llywodraeth.

statement. I don't know whether this is the right place to do this, but there is no reason, because they have to go before Parliament in Westminster, why we can't do this bilingually here, even if—. Members of Parliament in Westminster even could see the Welsh. So, I don't accept that as a statement and as a position from the Government.

[266] Pan fo'n dod i'r materion eraill y mae Simon wedi eu codi, rwy'n credu—ac rwyf newydd ddarllen ymateb y Llywodraeth—y dylem ymateb mewn ffordd sy'n dweud nad yw'r math yma o gamgymeriadau'n dderbyniol. Efallai ei fod yn well bod y Gorchymyn yn ystyried pethau nad yw'n *actually* yn bodoli, fel gwelliant sy'n mynd at bethau sydd yn bodoli; nid wyf yn gwybod. Ond rwyf yn meddwl y dylem fel pwyllgor ysgrifennu yn ôl at y Llywodraeth wrth dderbyn eu hymateb nhw.

When it comes to the other issues that have been raised by Simon, I think that—and I've just read the Government's response—we should respond in a way that says that these kinds of errors are not acceptable. Maybe it's better that the Order considers things that don't actually exist, as an amendment to something that does exist; I don't know. But I do think that, as a committee, we should write back to the Government having accepted their response.

[267] **David Melding:** Suzy.

[268] **Suzy Davies:** I don't disagree with any of that, but I must admit I'm just quite concerned that it's nine months late in the first place. I appreciate that delays to finalising regulations following consultation have resulted in a deadline being missed, but it's not as if either Government didn't know this article, or this directive, was coming in. Have you got any more detail as to why on earth that was so late, because, obviously, whatever caused that we also need to be avoiding, as well as just, you know, typing errors and phantom—

[269] **Mr Davies:** I think, from the consultation, they had quite a few responses that were critical of what they were going to do, and then they took time to work through those responses to see whether a middle ground could be reached, whereby they were complying with the directive and also taking into account feedback from stakeholders. I don't have any more information, apart from the fact that I checked that both Scotland and Northern Ireland have drafted these independently and they are both also late in the implementation of these directives.

[270] **Suzy Davies:** Would it be fair to guess—sorry, Steve—that perhaps other member states are similarly compromised, then, not just bits of the UK?

[271] **Mr Davies:** It may be the case; I'm not sure about other member states. It's interesting to note as well, though, that one of the reasons given for the fact that they were made as composite regulations was down to the fact that, you know, because of the subject matter, it was easy to make these cross-border—

[272] **Simon Thomas:** It's supposed to be quicker.

[273] **Mr Davies:** But, then, on the same point, Scotland and Northern Ireland have taken the decision to draft them independently. So, again, I wouldn't see that as a reason for drafting on a composite basis. Therefore, because they've been drafted on a composite basis, it's caused these other problems.

[274] **Suzy Davies:** Thank you.

[275] **David Melding:** Can I suggest, then, we endorse your report, and I write a letter—well, the committee writes to the Government—just saying how irregular this is and unacceptable? I understand the translation is unlikely to be done before May. Well, the work isn't likely to start until May, it sounds like. So, that's the situation.

[276] **Simon Thomas:** Jest ar y pwynt y cododd Alun, rŷm ni wedi trafod o'r blaen, wrth gwrs, sawl gwaith, y Gymraeg mewn rheoliadau fel hyn, ac onid ŷm ni wedi cael cadarnhad bod yna ddim rhwystr o safbwynt gweithdrefnau San Steffan iddyn nhw gael eu gwneud yn Gymraeg pe byddai'r Llywodraeth yn dymuno?

Simon Thomas: Just on the point that Alun raised, we have discussed many times before, of course, this issue of the use of the Welsh language in regulations of this sort, and haven't we had confirmation that there's no barrier in terms of Westminster procedure for these to be made in Welsh, if the Government so wished?

16:00

[277] **David Melding:** They can be laid or—I can't remember what the Clerk said in the end. There is a way that they can do it, but I can't remember what the process was.

[278] **Mr Williams:** The Chair wrote to the First Minister to seek a meeting with officials, and the First Minister has now replied agreeing to that meeting taking place. The meeting is currently pencilled in for early May when we will be discussing with Government lawyers and officials the approach to bilingual drafting of composite legislation.

[279] **David Melding:** Can you remember the detail of what the—

[280] **Simon Thomas:** There was something—

[281] **David Melding:** Yes, because the Clerk of the House of Commons wrote, didn't he, and advised us that, as a document or something, the translation could be laid, even though it wasn't technically a part of the legislation? I can't remember now if that's right, but it was something along those lines.

[282] **Mr Williams:** I will get back to the committee, but as far as I can recall, it could be laid as a command paper in the House of Commons.

[283] **David Melding:** There is a process anyway.

[284] **Simon Thomas:** Yes, I thought there was something we had identified—a process.

[285] **David Melding:** Okay, so we'll accept the report and we'll draft a suitable letter.

16:01

Papurau i'w Nodi
Papers to Note

[286] **David Melding:** Item 6 is papers to note. There's a written statement on the Social Services and Well-being (Wales) Act 2014 and the first tranche of consultation outcomes. We can note that statement.

[287] There's a letter from the Chair of the Environment and Sustainability Committee on

the Planning (Wales) Bill. You'll note the correspondence and the fact that Stage 3 proceedings on that Bill are scheduled for this week, I believe. Happy to note?

16:02

Cynnig o dan Reol Sefydlog 17.42 i Benderfynu Gwahardd y Cyhoedd o'r Cyfarfod
Motion under Standing Order 17.42 to Resolve to Exclude the Public from the Meeting

[288] **David Melding:** Finally, then, can we just meet briefly in private, just to give some weight to the evidence we've heard? I move the relevant Standing Order, unless any Member objects.

Cynnig:	*Motion:*
y pwyllgor yn penderfynu gwahardd y cyhoedd o weddill y cyfarfod yn unol â Rheol Sefydlog 17.42(vi).	*the committee resolves to exclude the public from the remainder of the meeting in accordance with Standing Order 17.42(vi).*

Cynigiwyd y cynnig.
Motion moved.

[289] **David Melding:** I don't see a Member objecting, so we will now conduct the rest of the meeting in private. Please clear the public gallery and switch off the broadcasting equipment.

Derbyniwyd y cynnig.
Motion agreed.

Daeth rhan gyhoeddus y cyfarfod i ben am 16:02.
The public part of the meeting ended at 16:02.